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HARRY L. MOOAR, Plaintiff in Error,

VB.

CHARLES H. RATHMANN. Defendant in Error. SOLLAT NAME CONDO

ERROR TO CIRCUIT COURT OF GOOK GOURTY.

225 I.A. 6411

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

It is sought by this writ of error to reverse an order or decree of the Circuit court of Cock County, entered Barch 31, 1920, sustaining defendant's general and special demurrer to complainant's bill for specific performance of a written contract for the exchange of certain real estate and dismissing the bill for want of equity. It is recited in the order that complainant did not appear to defend his bill and that no motion was made to file an amended bill. Defendant in error has not filed any printed brief or argument in this appellate court.

The bill alleges that on March 3, 1919, at Chicago, Illinois, the parties entered into the contract, which is set out in hace verba in the bill. It is provided in the contract that defendant, as first party, in consideration of the covenants thereinafter made by complainant, as second party, and "upon the performance" by complainant of said covenants, agrees to convey to complainant by general warranty deed certain described land and buildings thereon in Chicago, subject to certain mentioned encumbrances; that complainant agrees to convey to defendant by general warranty deed certain described farm lands in Sillard County, State of Utah, together with the improvements thereon, including water rights and oil rights, and all machinery, tools and implements, but subject to a certain mentioned first mortage; and that defendant further agrees to give to complainant at the date of the delivery of the deeds \$7000 in cash, to be

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CHARLES H. BATHLARS. .voran allinobreten

MERCH TO CINCETT GOURT OF . TERUNA MORRET.

225 I.A. 6417

DE PREMIONE SOULD CHIEF DELIVERED THE OFFICE OF THE COURT.

unbro un serever of reris to sive sidt of bismos at 17 ar decree of the Circuit court of County, entered Harch 21. of verymen falsons has leavened a fanchaste printaine . Deel mediatry a to epasamoltes officees tel Illa s'imministres prisely but singer less alarves to agenders and to' toers and that robus has at hestoor sk til . Those to show not file and notice on tolly has like with burled of Treeper ten bit imanhelemon you want to the an assenced bill. Defendant in error has not ittoe day printed brief or argument in this apprinted and belit

The bill alleges that on March 8, 1919, at Chicago, touts toersmon out at besivery at it . Illd ent at advey send at defendant, or first party, in consideration of the coverants shered without wide by complaining, as adona parky, and when the verse of secret, and covered of an analytic of accessory band hootspark atabase book ylanguran Kannang of handalande of Mensiones mission of resides, openido at morens emitties has incheriah of vermes of account familiations held ; securations brollie of shool with beditosek niedoo bosh ginerias Lorente yd county, State of West, tagether with the improvements theres, alous greathness ile ton , addit ile bins africks untak gallalous -dran imily bencimen a series of the anti-median mediant man description of the contract of th general and thet defendent further agree to give to complained at the date of the delivery of the deads \$7000 to come, to be secured by a second mortgage on said farm lands. The instrument contains the following clause:

"This contract is signed by C. H. Rathmann subject to inspection of said farm within 10 days from date hereof and acceptance or rejectment of the ranch and terms of this contract in writing at the expiration of said 10 days."

agreements inter alia that each party is to furnish the other within a reasonable time from the date of the instrument a complete merchantable abstract of title, or merchantable copy thereof, brought down to cover said date, or merchantable title guaranty policy made by the Chicago Title & Trust Co., showing good and sufficient title at said date in the respective parties to the properties hereby agreed to be conveyed by them, that brokerage fees or commissions shall be paid to a certain named broker by the respective parties as agreed between them and said broker; that "all deeds shall be passed and this negotiation closed", at the office of said broker, "within five days after the titles have been found good;" and that time is declared to be of the essence of the agreement and of all the conditions thereof.

was at the time of the execution of the contract, able, willing and ready to perform all that he was required to do under the terms thereof, but that defendant has failed and refused, and still refuses, to perform the acts that he was required to do by said contract; that on May 13, 1919, at Chicage, complainant did in writing and in person tender to defendant a good and sufficient warranty deed of the premises described in the contract as being owned by him, and in writing made a demand upon said defendant for the delivery to complainant of a good and sufficient warranty deed to the premises owned by defendant and as described in the contract; that complainant is able and anxious at all times to perform each and every part of the contract that he is legally bound to do; and

evented by a second mortungs on sold farm lands. The instrument contains the following clauses:

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The instrument also conteins unitual coverants and expenses in integral of the context of the co

The bill then allege described to be sentred, able, willing and ready to perform all that he was required to de mader the terms thereof, but that described he was required to de mader the terms thereof, but that described he failed and refused, and will refused, to perform the sous time no was required to de by hald one tract; that on may 15, 1918, at Unicence, caspinizant did is writing and is person tender to described in the contract and sufficient warrounty dasd of the previous described in the contract as being owned by him, and is writing made a decaded upon said defendant for the delivery to campinizant at a good and sufficient warranty dest to delivery to campinizant at a good and sufficient warranty dest to the premise owned by described in the contract; the premises owned by described and as described in the contract; and every each of the contract that samplement is able and and sa described in the contract; and every each of the centract that he described in the derivative and the samplement is able and and the described in the contract and end every each of the centract that he is legally bound to deep and

that he is without adequate remedy at low and asks that a court of equity decree that defendant specifically perform his portion of said contract, complainant tendering and effering to perform any and all things required of him thereunder. The prayer of the bill is for a specific performance of the contract, a receiver and an injunction.

tract relative to defendant making an inspection of complainant's farm or ranch, complainant makes no allegations in his bill what-soever. He does not allega that defendant did or did not make such inspection within the 10 days mentioned, or that at the expiration of said 10 days defendant accepted the ranch and the terms of the contract, or that he did not at said expiration in writing reject the ranch and the terms of the contract. Further-more it does not appear from any allegation in the bill that complainant within a reasonable time from the date of the contract furnished defendant, as he was required to de, with a merchantable abstract of title, or merchantable copy, brought down to the date of the contract, or a proper title guaranty policy, showing a good and sufficient title to said farm or ranch in him.

We are of the opinion that the court was fully justified in sustaining defendant's desurrer to the bill and, under the eircumstances recited in the order, in displaying the bill for want of equity. The decree is affirmed.

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HELEN CHLUKSKY, Defendant in Error,

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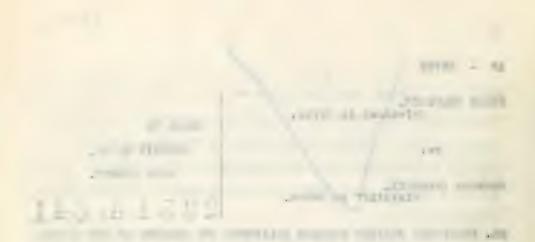
FRANCES CHLUMSKY. Plaintiff is Error. CIRCUIT COURT,

225 I.A. 641

MR. PREDICIRG AUSTICE GUIDLEY BULLY TRUD THE OPINION OF THE COURT.

Plaintiff in error, hereinefter referred to as defendant, seeks by this writ to reverse a judgment for 1750, entered against her after verdict by the direuit Sourt of Cook County, in an action for elander and alienation of affections. Defendant is the mother of plaintiff's husband.

The action was commenced on Ceptember 4, 1915. tiff's declaration consisted of three counts. The first count alleged in substance that, before and at the time of the happening of the grievances complained of, plaintiff was a married woman living with her husbend, was pregnent with child by him, and had always been a virtuous and chaste women and of good name and reputation, etc.; that defendent, contriving to injure plaintiff. etc., on August 22, 1915, in Chicago, in said county, in a certain discourse which defendant then and there had of and concerning plaintiff and in the presence and hearing of divers persons who understood the Bohamian language, falsely and maliciously speke and published of and concerning plaintiff certain false, scandalous and defamatery words, in said Nebemian language (words set out in that language); that said words signified and meent in the english language, as follows: "'That is not her husband's child' (messing to insimuste that the child with which plaintiff and pregnant was conceived in adultery); 'she used to go with her mother to picnics and who knows where she picked it up' (meaning to convey that plaintiff had committed adultery and had been unchaste and u faithful



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THE RESIDENCE AND VALUE OF STREET A STATE OF THE STA Mr. 12 wall had be less than 17 years posterior at regards ness below a no Valuable the biddings, presently, all by Living our part of sight on a removed of the birth by birth or war le organization programme elementation elementation Committee and a supplied of the same and but the same and the MARKET BE ARREST OF THE PARTY O and the party of a confidence of the small analysis of the constraints. aan a regeraa ina ya iliferia dinaga ahii ilikuwa teeninga ahii ahii ilikuwa ilikuwa ahii ahii ilikuwa ilikuwa ាស់ស្រុក គឺការការការប្រកម្មក្រុម ការាការតែការ៉ា ប្រការក្រុមប្រសាធានការការការការប្រការការការការការការការការការក Sections of the states will be a section of the sec to the feet freet, buttered believed to the st , these qualitative has to the tire of the entry feitigate a south a rest of entry at william the gip office food will be all fights a perform on a source. A distribute of the contract of t elaza, er esare spreire e el bace el tagenda uba el evicione. And the property of the grant of the contract are the first of earlier way to the good form a strong things.

to her husband); 'it' (meaning suid unborn child) 'does not belong to him' (meaning said plaintiff's husband"; and that by means thereof plaintiff has been greatly injured and demaged, etc.

The second count, containing similar preliminary averments, charged in substance that defendant, on June 10, 1915. at Chicago, in said county, in a certain discourse which defendant then and there had with plaintiff's said husband of and concerning plaintiff, and in the presence and hearing of divers persons who understood the Mohemian language, felsely and maliciously spoke and published of and concerning plaintiff certain false, scandalous and defamatory words, in soid Behavian language (words set out in that lenguage); that said words signified and meant in the English language, as follows: "" then those letters' (meaning certain letters which plaintiff was receiving from her friends and family in 'urope) 'in German, take them' (meaning said letters) 'from her' (meaning plaintiff) 'and tear them up' (meaning said letters); 'they' (meaning said letters) 'are from a lover in Bohemia' (meaning to insinuate that plaintiff has a lover in Bohemia with whom she was corresponding)"; and that, by means of the committing of said grievances by the defendant, plaintiff has been "greatly injured in her good name and reputation, and shurned, avoided, neglected and deserted by her husband, and brought into public scendal and disgrace." etc.

The third count, which was the only one concerning the alleged alienation of the affections of plaintiff's said husband, alleged in substance that, at and before the happening of the grievences complained of in said count, plaintiff was matrice to defendant's son, was living with him as his sife and was frithfully and obediently performing her duties as such wife; that defendant, well knowing the premises but intending to injure plaintiff, etc., did, on various occasions between June 1, 1914, and the consencement of this suit, arongfully and injuriously "entice and persuade the

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said hasband of plaintiff to neglect plaintiff and to neglect and provide for her support, and finally to depart and separate himself from plaintiff and from the dwelling house of plaintiff without leave of plaintiff"; and that thereby plaintiff has been deprived, etc., and greatly damaged, etc.

On the trial plaintiff and three witnesses testified in her behalf. At the conclusion of plaintiff's evidence in chief defendant moved for a directed verdict in her favor and also moved that the jury be instructed to disregard the first count of plaintiff's declaration, but both motions were denied. Thereupon defendant and five witnesses in her behalf gave testimony, and then certain witnesses in behalf of plaintiff were heard in rebuttal. At the close of all the evidence defendant renewed her metion for a directed verdict in her favor but the motion was again denied. Defendant then made three separate motions that the jury be instructed to return a verdict in defendant's favor on the first, second and third counts respectively, but these motions were all denied. The jury returned a verdict finding the defendant guilty and accessing plaintiff's damages at the sum of 1750, and the judgment followed.

It appears from the undisputed evidence that plaintiff married defendant's son, Joseph Chlumsky, on February 21, 1915; that they conducted a small grocery store at No. 3616 Cortex street, Chicago, and lived in rooms back of the store; that prior to about Kay 1, 1915, defendant and her family lived in a cottage in the rear of the same lot, when they moved into another cottage across the street; that in the latter part of May, 1915, the relations between plaintiff and defendant became somewhat strained and that thereafter unpleasant incidents occurred; that the grocery store was sold about the middle of deptember, 1915 (after the commencement of the present action), but plaintiff and her husband continued to live together in the rooms back of the store

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until the end of that month, when they moved to a flat a considerable distance away and there lived together for a short
paried of time, when plaintiff refused to live there longer and
went to live with her mother. Plaintiff testified that after
her said refusal and her going to live with her mother, plaintiff's bushand went to live at defendant's home, and that plaintiff and her bushand never thereafter lived together.

No useful purpose will be served in discussing the testimony bearing upon the several charges of slander contained in the first and second counts. Juffice it to say that we are of the opinion that the charges contained in the first count were not sufficiently proved as charged so as to serrent any recovery on that count. It is said in Ransem v. McCurley, 140 Ill. 626, 630; "It is well settled that to authorize a recovery in an action of clander, the words laid in the declaration, or enough of them to charge the particular offense alleged to have been imputed, must be proved substantially as charged. Evidence of the speaking of equivalent words, although having the came import and meaning, is not admissible, and words spaken interregatively are not admissible to sustain an allegation of words spaken affirmatively." (See, also, Sanford v. Goddis, 15 Ill. 238; Milborn v. Odell, 29 Ill. 456, 458.)

that "the words testified by the witness," she was called to prove that defendant uttered and published the words as charged, "are the same words as set forth in the second count." But they are not actionable per se, and can only be rendered actionable by plaintiff averying and proving special damages resulting from their utterance and publication. (Strauss v. Never. 45 Ill. 385, 388.) Counsel for defendant makes the point that no special damages were proved. After a careful examination of the evidence bearing on this count we are of the opinion that the point is well taken. Counsel for

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 plaintiff here argues that as a result of the uttoring and publication of said words plaintiff's his band avoided, neglected and deserted plaintiff. The evidence is clearly to the contrary. The incident occurred in June, 1915, and plaintiff and her busband thereafter lived together until about October 1, 1915, nearly a month after the present action was commenced, when plaintiff left her husband and want to live with her mother.

the effections of plaintiff's husband, the gist of the charges are that on various accessions between June 1, 1915, and the commencement of the suit (September 4, 1915) defendant wrongfully enticed and persuaded said husband to neglect her, to fail to provide for her support, and finally to desert her without her consent. To do not think any of these charges are sufficiently proved by the evidence. As to the charge that defendant enticed the husband to desert plaintiff, it appears that the separation of plaintiff and her busband did not occur until about one wonth after the action was commenced, and it also appears that at that time plaintiff objected to the size of the flat they had moved into and left him and went to live with her mother.

Our conclusion is that the judgment of the Circuit Court must be reversed.

REVERSED WITH FINDINGS OF FACT.

BARNES and MORRILL. IJ .. concur.

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FINDINGS OF FACT.

defendant did not speak and publish the words of and concerning plaintiff as charged in the first count of plaintiff's declaration; that plaintiff was not in anysise injured as damaged, or avoided, neglected or described by her bushand, by reason of defendant speaking and publishing of and concerning plaintiff the words as charged in the accord count of said declaration; and that defendant is not quilty of the charges, or any of them, relative to the alleged elienation of the affections of plaintiff's husband, as contained in the third count of said declaration.

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HUGH MCLAUGHLIN.

VS.

Appellee,

APPHAL PROM

MUNICIPAL COURT

OF CHICAGO.

SOMEN'S CATHOLIC OFFICE OF FORESTERS.

Appellant.

MI. PURIDING JUSTICE OF THE DELIVER THE OFFICE OF THE COURT.

This appeal is taken from a judgment for \$1,000 entered against defendant by the Municipal Court of Chicago on January 22, 1921.

The action is upon a benefit certificate for \$1,000. issued on May 38. 1903, in favor of plaintiff as beneficiary. by defendant, a fraternal insurance society, upon the life of Bridget McLaughlin, mother of plaintiff. The made written application for membership in the society on May 14, 1903, in which she stated over her signature "I was born in Ireland " " on the 16th day of Jugust, 1864, and am between 39 and 40 years of age." She died on April 17, 1919, at Chicago, Illinois. There was a tried before a jury, resulting in the return of a general vordict finding the issues against defendant and assessing plaintiff's demages at 11,000, "with interest at 5 per cent per annum." The court submitted to the jury at the request of defendant two openial interrogatories and they returned two special verdicts, as follows:

"Interrogatory No. 1: Was Bridget McLaughlin over fifty years of age at the time it is claimed that she become a member of the defendant corporation? Answer: No.

Interrogatory No. 2: On Way 14, 1903, and there-after until and on way 25, 1903, was bridget McLaughlia over fifty years of age? Answer: No."

Defendant at the same time also requested the submission to the jury of the following other special interrogatories, which

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request the court refused, viz:

"Interrogatory No. 3: Was Bridget WcLaughlin born more than one year before August 16th in the year 1864?

Interrogatory No. 4: Did Bridget "cLaughlin by herself or any other fail to pay benefit assessments to defendent or to any one for it for the month of February and thereafter in the year 1919?"

On the hearing of defendant's motion for a new trial plaintiff remitted the interest mentioned in the general verdict, and all claim for a judgment in excess of \$1,000, and thereupon the court overruled defendant's said motion and also its motion in arrest of judgment and entared the judgment appealed from.

It is alleged in plaintiff's statement of claim that the certificate or policy of insurance is med to Bridget McLaughlin is in the possession of defendant and that it has repeatedly refused to deliver the certificate to him; that at the time of her death she was a member in good standing of defendent and its subordinate court, "Isabella Court So. 8: " that on or about December 1, 1918, during her lifetime, she went to the general offices of defendant, at Chicago, for the purpose of negotiating a loan from a third person upon said certificate, which certificate she then had in her possession and exhibited the came to Anna . Phelan, as authorized agent and the high corretary of defendant; that egainst her protest asid Phelan took possession of the certificate, claiming the right so to do because of an alloged error or misrepresentation on her part as to her age at the time she became a member of defendant, and then end there notified her that defendant would not thereafter accept from her, or from anyone in her behalf, any further payments or assessments under said certificate; that ever since anid accurrence she, or plaintiff or others in her behalf, has from time to time duly tendered, and offered to pay, to defendant the assessments levied against her under the terms of said certificate, but that defendant refused to accept the same: that after her death and within proper time plaintiff offered to make the proof of her death, and repeatedly demanded of

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defendant the proper blanks required for that purpose, but that defendant refused to furnish said blanks or receive such proof of death, claiming that her insurance had lapsed; and that there is due to plaintiff, as the beneficiary named in the cortificate, from defendant the sum of \$1,000, together with lawful interest thereon from the time of the death of said Bridget Bolsughlin on April 17, 1919.

In defendant's affidavit of merits, including an amendment thereto made at the time of the trial, it is alleged as one ground of defense that long before said cartificate ses issued to Bridget Volumehlin, the charter, constitution and laws of defendant provided. and etill provide, that no person shall become a member of the defendant society who is over 50 years of age; that at the times of the signing of her application to become a member, her admission as a member and the issuance of said certificate, she was over 50 years of age; and that, therefore, plaintiff is not entitled to recover my. in of this defendant, because the supposed contract of insurance is ultra vires and .void. And, as another ground of defense, it is alleged that in her written application for membership, she wilfully, falsely and fraudulently stated that she was born on August 16, 1864, and was between 39 and 40 years of age; that in said application ahe warranted said statements to be true; that they were untrue, in that she was at the time of making said application more than forty years of age; and that they were wilfully and knowingly falsely made; and as a third ground of defense, it is alleged that anid Pridget Welsughlin in her lifetime surrendered asid certificate and couled paying dues and accomments, and, in accordance with the by-laws of the society. became suspended and ceased to be a member of the society and was not in good standing therein at the time of her death, in that she paid no monthly dues and assessments for or during any part of the year 1919, prior to her death.

It thus appears that the pleadings presented three main issues of fact to be decided by the jury, viz: (1) Was the insured

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he actualise at petitions, and see to the attack on age banary nor as imposite at it with a different to sold and to stand ingle And not a great any antipolitican bina new Tork good field modeling to hile, the director, openitables and less of her the northing, japon. Toko sit to inform a same if the manage as soil wellow, little has spirity which is ever Mi george of agon think this think of the window the andres of an asiante world, their e amount of magazity and "two jong . To british an over your offer, blookings of blooking seminated a !! to the remarkable of the season of the respective of the respective of the season of the season of this of correct to make young all school provide that begain it is an early to educate a street as the . This but their the letter and the property of the property of the street, and stated and Description of the contract of the contract of the contract of ledoffer from refer med to a lighter bloom out derive trans to become the bare to be encuded. with this set, and we are the true with a second of the second of the To strong a comit mada espen andalendalique bine testalen la mada per de on two twice tietlet ingrisers for allables error and but in the subdension function from held contract of all persons for same printers ART ALTER TO THE PARTY OF A STATE OF THE PARTY OF THE PAR the state of the more thank and the second of the state of the second of the you are less produces and, he endgue to meet have a base of the state energy All or mine of the private that the next and it of the continuous faces at through the Ten State of the telegraph that is a state of a patient of the telegraph of telegraph of the telegraph of tel •្សាស៊ីស្រាស់ ស្រាស់ សេស៊ី ២២ឆ្នាំនេញ _{ព្}ាំស្ថិត<u>ន</u>

became in the main (I) and the theory was the property of the property of the constant of the

over 50 years of age at the time she become a member of the defendant society, on May 18, 19037 (3) Did she in her application for membership on May 14, 1903. Falsely state her age to be 40 years, or under, knowing said statement to be untrue? And (3) did she cease making payments of the dues and assessments for the months of the year 1919, prior to her death in April, 1913, or were those dues and assessments tendered to the society and refused by it?

As to the question of her age the evidence is conflicting. It will serve no useful purpose to set forth that evidence in detail. Leffice it to say that we think that the evidence is sufficient to warrant the jury in finding that at the date of her admission to the society the was not over 50 years of age and that at the time she signed her application she did not falcely or fraudulently state her age to be 40 years or under.

As to the payment of her monthly dues and assessments the evidence shows that about the end of the year 1918 the society attempted to cancel her certificate on the theory that she was over 50 years of age when she became a member, and thereafter refused to receive any further monthly payments, but the evidence sufficiently shows that sufficient tender of the monthly dues and assessments were made in her behalf prior to her death.

Complaint is made of the admission in vidence of a certain check and certain letters and of certain other rulings on evidence. We do not think that any error projudicial to the defendant was committed in those perticulars.

Complaint is also made of the refusal of the court to submit to the jury the special interrogatories Nos. 3 and 4 above mentioned. Counsel says that interrogatory No. 3 was submitted on the issue of a material misrepresentation in the application of the insured, as the difference of a year in the age makes a change in the smount of the monthly payments to be made. The question of a material Add Bo t down of man a color of the col

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misrepresentation, wilfully and knowingly made, is not included in the interrogatory. As to interrogatory No. 4, the question submitted was impaterial because it is conceded that actual payment of the dues and assessments for the month of February, 1917, and thereafter until her death, was not made. The question was rather whether the dues and assessments for said month and theresefter had been tendered and refused. In our opinion no prejudicial error was committed by the court in refusing to submit said interrogatories.

The judgment of the Bunicipal Court is affirmed.

Barnes and Morrill, JJ., concur.

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Paul Elein, his father and next friend,

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SUPERIOR COUNT,

MARRINT B. BORLAND. Appellant.

225 I.A. 641

MR. PARAIDING JUSTICA CALLEY DELIVERED THE OPINION OF THE COUNT.

This is an appeal by Harriet B. Borland, defendant, from a judgment for \$8,000, rendered against her after verdict by the Superior Court of Cook County in an action for damages for personal injuries received by plaintiff on Havember 15, 1915.

Plaintiff was nearly 16 years of age and was employed by the Brankom Frinting Company, a tenant on the sixth floor of the building, owned by defendant, at No. 506 Federal street, Unicago. On this floor there was a pausoager elevator in front and a freight elevator in the rear. Impleyees of the Intaling Company were accustomed to use both slevators when taking bundles down, the choice between the two elevators being dependent upon the size of the bundles. It a pushcart was used the ampleyees would go down in the freight elevator with the eart. On the day in meetion plaintiff started from the shop of the Frinting Company on the wisth floor with a pushoart for the purpose of taking it down on the freight elevator and delivering cortain bundles. He went to the clevator, rang the bell several times and then walked down to the fifth floor. In attempting to step in the elevator which was then at that floor the operator took hold of him, shoved and kicked him, and he went through a railing and fell from the fifth to the fourth floor and was injured.

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Plaintiff's original declaration consisted of two counts. The first allaged in substance that the defendant by her agent and servant with force and arms assaulted plaintiff, struck and hicked him, and violently three his from the fifth floor to the fourth floor of the building, whereby plaintiff was permanently injured, etc. The mosend count alleged that by force and arms defendant casculted pleintiff and struck and kicked rim, whereby, etc. Pefore trial plaintiff filed two additional counts, in the first of which it is alleged in substance that defendant was the owner of the building and operated an elevator for the carriage of freight and passongers between the flaors of the building and employed a certain operator or conductor for the operation thereof, and especially for carrying the tenants and their employees; that plaintiff, a minor, was employed by one of defendant's tements in the building and was rightfully entitled to ride and be sufely carried on the elevator; that, as plaintiff was in the act of entering the elevator on the fifth floor of the building for the purpose of riding as a passenger on the elevator, defendant, by her agent and servant, to-wit, the operator or conductor in charge of the elevator, with force and ares assaulted plaintiff, violently atruck and kicked him, and violently threw him from the fifth floor to the fourth floor of the building, whereby, etc. The second additional count was dismissed upon the trial. To all of the counts defendant filed pleas of the general issue, and to the additional counts a special plea denying the operation of the elevator and the employment of the operator.

Upon the trial defendant admitted the ownership of the building and elevator and withdrew her special plea. elthough denying that at the time the alleged assault was committed the elevator operator was setting within the scape of his ampleyment. He evidence was introduced by defendant.

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It appeared from the testimony of plaistiff's witness, Dr. Thernton, a physician who treated plaintiff about a dozen times following the occurrence, that plaintiff's injuries consisted of a cut about three inches long on the left sade of his head above the ear, which required stitches, or injury to his nose, and bruises on his back and face. It further appeared from the testimony of other withrooss that from the time plaintiff first learned to talk and up to the time of the occurrence he had an impediment in his appeals which caused him to statter and stammer. Although the elineages differed somewhat as to the extent of his stammering prior to the docurrence, there was testimony to the effect that after the occurrence his aperch become and continued to be much less understandable. Plaintiff sought large demages on the theory that the less faverable condition of his speech, claimed to be permanent, sun saused by the occurrence in question, and two physicians, Dre. Thereton and Burdock, were called as expense in support of this sheary. The trial court, on its own motion, comes an execution of the plaintiff to be made by Br. Mdzmnd Jacobson, a physician sclested by the court, and the latter testified as an expert in overour disorders.

errod in refueing to direct a verdiet for the defendant. The argument is that it was not shown by a preparturance of the evidence either than the ansault was committed by a servent of the defendant or that in consisting it he was acting within the scope of his amployment. The effect of defendant's partial withdrawal of her special plan, and of her admissions on the trial, was that the was the sense of the building and clavator, and that the operator of the elevator was her servant.

(Pennsylvania Co. v. Chapsan, 220 Ill. 428.) Furthermore, plaintiff's evidence sufficiently shows that said operator

arrestly attributed to medical and have been properly ar promition. Controlled, indicate a backmander of ware each que of all releas, Ando, and economic religions in the end niti de la cara de la malanta a acesta de esta de esta de estado de la constituira della constituira d agel to Michael and a weeden father the Region Wilston away on a consecut based week, the bookens on ake a ok pad from. It Duckher appended from Colfedo), greft and men their nemental and an income and got agree the a to the trail on the boarding of basiness and The STANK AS AND DANKS IN the Shares and all properties as ្រុកស្រាស្ត្រ និង្សា ខ្លាប់ និង នេះ ប្រាល់ប្រឹក្សា ខេត្តប្បារប្រែក្រុម err erriff (construmed and all voits, paints Bridge and empression and nearly dearly dealing and an expensional . With the till stop is said and i year-dir all se seil. ... topia and green to an adventage of the second to a teration of the control of the contr agreed and to become an afragram to being the American blo BE TO ARRIVADORS TO STORY AND DESCRIPTION OF APPROXIMATION OF SECURISE SELECTION IN TRANSPORT AND DESCRIPTION OF SELECTIONS street of teelings of the building and the face of the discount.

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was defendant's servant, that defendant was specifing the elevator by said servant, that plaintiff had a right to ride on the elevator as a passenger, and that he was a passenger, or about to become such, when the assault was committed. Under such circumstances we think that defendant was liable for the assault and that the court did not err in refusing to direct a verdict for defendant. (Fartford Deposit Co. v. Jollitt, 178 Ill. 222; Springer v. Pord, 189 Ill. 430; Fold v. Sedimon Building Co.. 186 Ill. App. 29; Chiuge & Entern T. Co. v. Flaggar, 103 Ill. 548, 550; McWahon v. Chicage City Ty. Co., 238 Ill. 334, 338.)

Counsel for defendant further centand that the court committed errors in the admission of cartain testimony of the physicians who were called as experts, and that there errors brought about a vardict which is monifestly excessive. carefully exemined the testimony of the three physicians and are of the opinion that in the examination of each cartain testimony, projudicial to the defendant, was arreneously admitted, and that on this account the judgment sunt be reversed and the cause remanded for a new trial. No queful impose will be served in mentioning all of the testimony which we does projuticial. It is sufficient to any that in the long hypothetical meations severally asked of and answored by Drs. Thornton and Murdock, certain assumptions were contained therein for which there was no sufficient besie in the evidence, and which questions called for answers which were speculative. Dr. Murdesk was also allowed to tectify in detail as to an examination of plaintiff, made the evening before, and as to his observations concerning plaintiff's then condition. Dame of his testimony was based upon subjective symptoms and should not have been admitted. (Greinke v. Chicago City Ry. c., 234 Kll. 564, 571; Shaughnessy v. Holt. 236 Ill. 485, 488.)

For the reasons indicated the judgment of the superior Court is reversed and the couse remanded.

REVEREND AND REMANDED.

Morrill, J., concurs;
Burnes J. took no nort in the desistan of the sace

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12 - 26704

JOHN C. PATTERSON et al., Plaintiffs in Tror,

V# .

SOLONON A. SWITH et al., Defendants in Error.

CIRCUIT COURT.

1.4

BR. JUSTICA BARRES BULIVERED THE OFISION OF THE COURT.

This writ brings for review the action of the court below in mustaining the several desurrers filed to the emended declaration by which plaintiffs in error elected to stand.

The declaration is in trespass on the case alleging that defendants wrongfully, etc., conspired to, and in furthermos of the conspiracy, did make to the court in certain chancery proceedings certain false, fraudulent, etc., representations for the purpose of having the court wrongfully, improperly and illegelly enter a decree therein, which decree, the declaration alleges, has not been set aside and is still in force and effect.

The last allegation dispenses with a fuller statement of the case, for while the decree remains in force, a proceeding in the nature of a collateral attack, like that set forth in the declaration, cannot be maintained. (Duffy v. Frankenberg et al., 144 Ill. 103; Gilmare v. Bidwell, 191 Ill. App. 158; _chanb v. O'Ferrall, 81 Atl. (Md.) 789; Young v. Leach, 50 H. Y. Jupp. 670; Engstrom v. Eherburns, 137 Bass. 153; Lyferd v. DeMeritt. 32 H. H. 234; Horner v. Schinsteck, 101 Fac. (Ean.) 996; Junlap v. Glidden, 31 He. 435.)

The declaration is predicated on fraud in obtaining the decree by false and fraudulent representations to the court, and not fraud that went to the jurisdiction of the court. In

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such a case the decree can be attacked only in the original cease and cannot be imprached in a separate and independent proceeding. (Pratt v. Griffin, 223 Ill. 349, 350.)

was entered, the action was none the less a collateral attack on said decree, for the gist of it is a claim of injury from an unjust or illegal decree resulting from the alleged conspiracy.

But the decree is presumptively valid until set aside or impeached, and a party or privy cannot attack it in a collateral proceeding. See doom it unnecessary to analyze the authorities above sited entermays to the case furnishes no exception to it. (13 Cyc. 1999)

But it appears on the face of the declaration that the alleged misrepresentations were mainly - if not whelly so far as material or actionable - as to facts included within the findings of the decree, and therefore expressly adjudicated in that suit. Hence so cannot but look upon this preceeding as in offset a renewed attempt to rolitigate and attack in another form the same decree unsuccessfully sought to be relitigated in Fatterson v. Sorthern Trust Co.. 267 Ill. App. 365, affirmed in 286 Ill. 564.

The decree will be affirmed,

APPIRED.

Gridley, P. J., and Morrill, J., concur.

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225 I.A. 642

JOHN C. PATTERSON et al., Plaintiffs in Error.

WS.

SOLOMON A. SMITH et al... Defendants in Error. ERROR TO CIRCUIT COURT. COCK COURTY.

MR. JUSTICE BANKS DELIVERED THE OPTSION OF THE COURT.

This writ of error was sued out December 13, 1920, to review a final judgment order entered December 7, 1918, and hence not having been sued out within two years from the date of said order, as required by section 117 of the Practice Act, as smended in 1919. (Chap. 110, sec. 117, Cabill's state. 1932) it must be dismissed.

RHIT DISEISAED.

Gridley, F. J., and Morrill, J., concur.

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21 - 26910

ADELINE S. MOREY. Defendant in Error.

VS .

ALSENA S. CHAPELL, Administratrix of the cotate of Sherman S. Chapell, deceased. Plaintiff in Arror. ERROR TO SUPERIOR COURT. COCK COUNTY.

225 I.A. 647

MR. JUSTICE BARNES DELIVERED THE COURT.

This writ brings for review a judgment of \$6,000 for personal injuries resulting from the collision of two automobiles.

As grounds for reversal it is contended that the damages were excessive, and that plaintiff in error was prejudiced by argument to the jury and the absence of the judge from the court room when it was made.

As it is practically conceded that the verdict as to liability would not be disturbed on the ground that it was against the manifest weight of the evidence with respect thereto, we shall not review here the circumstances of the accident.

estimate damages were uncontroverted. Fractically the only controverted fact with respect to the character of the injuries was whether plaintiff received a skull fracture. The ovidence thereon consisted mainly of medical opinion. This there was an X-ray of the skull introduced in evidence the only two physicians testifying as to what it indicated disagreed as to whether it showed a fracture. The diagnosis of plaintiff's two physicians who attended her shortly after the accident was that the attendant conditions or symptoms indicated shull fracture, but one of them admitted that the same symptoms might follow without skull fracture from a concussion of the brain, which it is not

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questioned resulted from the accident. He also said that this might be a case of either concussion of the brain or a fracture. The diagnosis of the other physician was based upon the same or like symptoms. Plaintiff's own witnesses, however, were unwilling to say that her injuries resulting therefrom would be permanent. On the other hand, defendant's medical expert testified that in his opinion the symptoms referred to ensued from the concussion of the brain and did not indicate any local or absolute brain injury, and that the absence of such an indication was conclusive of only a temporary effect on the brain as a whole.

It does appear, however, that before the accident plaintiff was healthy and active, that she cared for her invalid father. 85 years of age, and performed her general household work and her duties as teacher of a primary school, in which she conducted exercises requiring some strenuous physical exertions, and that since the accident her ability in these respects has been much impaired. The was in the heapitel for six weeks and did not resume her duties as a school teacher for several months, suffering in the meantime, and since to some extent, pains in and back of her car - which bled at the time of the accident - and in her right leg and back.

without going into further details we think the evidence is hardly sufficient to sustain a finding that there was a shall fracture, and that it is inferable from the testimony that a concussion of the brain with no apparent localized effect is not as serious in its consequences as a shall fracture. While there is no fixed standard for determining damages in such a case, they will not be permitted to exceed what is reasonable under all the circumstances. In this case we think it probable the jury included shall fracture as one of the elements of damage. The proof tending to establish its existence was too weak to

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claimed point into deriver arising as think the claim of himself there claim to hardly east initiate to curtain a finding that there claim to start and the claim in a fall of the continue of

warrant such inclusion. We think damages should not be assessed above \$5,000.

But it is argued that the jury were influenced in assessing demages by prejudicial orgument and the absence of the judge from the court room when it was made. The remark of plaintiff's counsel, on which this claim is predicated, reads:

"One word as to demages. Remember, gentlemen, that this is the only time that Mrs. Morey will ever have the opportunity to appear before a court and jury and ask that demages be assessed to her for the injuries she has sustained in this accident. If Mrs. Morey, inside of six months, by reason of some condition inside of her head, which is not now apparent, and if she would within six months become a total incapacitated paralytic she could never come into court and ask for damages."

Counsel for defendant objected to the remark and asked counsel arguing the case to "wait until his honor passes on it." Counsel improperly replied: "tell, your objection is not very important anyway." At this stage of the proceedings the trial judge returned to the court room from his chambers, where he had been when such remarks were made, and the statement was read to him and the objection thereto was over-ruled.

absence of the judge from the court reas without suspending proceedings (Loftis v. Chi. ys. Co., 293 Ill. 475) we can not think that either or both had any appreciable effect upon the verdict. The evidence upon the question of liability was not close, and, aside from the cuestion of shall fracture, the controversy as to the matters upon which the jury were called to estimate damages were only as to the degree or extent of the injuries, as to which the testimony was specific. The jury were explicitly instructed that the damages were to be determined from which the evidence under the instructions of the court XXX streeted the jury's attention only to such damages as plaintiff had sustained, enu erating only as elements thereof her pain, loss of health and time, inability to work and physicians' bills. XXX An

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instruction particularly warned the jury against being influenced by sympathy or any consideration other than the evidence and the law as given in the instructions, and against considering statements of counsel not proved by the evidence. There was nothing in any of the instructions or the evidence from which the jury could infer the right to recover for anything that might happen in the future, and we do not think the remark, which plaintiff in error criticizes from that point of view, and which defendant in error refers to as merely illustrating the limitation of her right to a single recovery, can reasonably be said to have misled the jury into considering as an element of damages a possible development in plaintiff's condition no where clse referred to in the record and upon which there was no testimony. e think it would be a far fetched conclusion that the jury disregarded explicit instructions as to what they were to consider in assessing the damages and drew from this vague remark a conclusion at variance with the theory of the case as disclosed both by the evidence and the instructions.

to be fatal error for the judge to absent himself from the court room during the argument to the jury, unless it appears that the complaining party was not prejudiced by what occurred in the court during his absence. No complaint is here made of any other error than the effect of counsel's remarks, which seemingly would be no different if the judge had been present. There was nothing in the incident to suggest an impropriety of precedure or conduct invited by the judge's absence. In this respect the facts are distinguishable from those commented upon in the Loftis case and others referred to. while neither counsel's remarks when critically analyzed, nor the judge's absence can be approved, we think it would be magnifying their significance out of all proportion to their probable influence upon the jury to treat them as reversible

manufact gainst hanny and any communicating and selected and there are thing out reds to the makings have the to this stand opin diametra entry and entraction and all arts grans and and the tracking of the end for teamer ? Trail and sects wert sometime of its employed but is use up ក្រុមការ អត្ថិ នុងក្រុងក្រុម មិននឹង ក្រុងស្រីក្រុក ខេងកំ ២០០០០ ការ ស្រី សមុទ្រនៃមានសុវ Trivatele delle "Mremer edi Talde des eb en bre jeun barrier of the last term of the party and the term of rod to make alkaik was paidana eddl giptom up on evelou reduce what is taken by additionable that opposite all paint or an inquire address a regional to human's to be particulated what went told in the sale in the city and the an electric to the war to the di sinida e . ennouir con una em executa doita noque im tro Military accompanies out not not employed inches the st a si Mare AND LANGUAGE AND POLICEMENT OF SOME PARTY AND REAL PROPERTY HAS REGISTER AND REPORT OF STREET ASSESSMENT ASSESSMENT AND ADDRESS OF VARIOUS bus endelige all of Mind Descipath to bits in 9950 the Lacienties.

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error where the record shows unquestioned liability, and practically no controversy as to the material elements of demages or the facts, except as to whether there was a skull fracture.

We think, however, that a judgment for \$5,000 is as much as should be allowed. If, therefore, plaintiff will within ten days herefrom remit from the judgment to that amount it will be affirmed, otherwise the case will be reversed and remanded.

Anid remittitur, however, is allowed not upon the theory of curing error during argument, but merely because from the evidence the damages appear excessive.

AFFIRM TO ON FURITTITUM TO \$5,000.

Gridley, F. J., and Morrill, J., concur.

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JOHE DACEY.

appellee.

VB.

BRIDGET DACEY.

APPRAL FROM

MUNICIPAL COURT

OF CHICAGO.

225 I.A. 6424

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Appeller such his wife to recover on her personal note for \$1500. Her defense was that the note was given under duress; that prior thereto plaintiff in consideration of her promise to marry him agreed to pay off a mertgage of \$2205 on her home, and to that end paid towards it \$1500, which is the \$1500 purported to be represented by said note. The also pleaded she had a velid claim against him for board and lodging, and filed a not-off for the same, which included laundry work, nursing, care and attendance from January, 1916, about the time of their marriage, to December 14, 1920, when the suit was pending. In the statement of set-off she alleged the agreement was for \$20 per week and she credited him with partial payments, leaving a balance exceeding the amount payable under the terms of the note.

A jury was called and the testimony of the respective parties heard. In the midst of the testimony of defendant with regard to her set-off the court, overlooking the effect of the statutes in removing restrictions upon the powers of bushend and wife to contract with each other, and enabling them to sue each other on such contracts, struck out all the testimony relating to said set-off, and the set-off itself. This was error. Issues were formed on the set-off, which, so far as it set up a claim for board and lodging, was enforcible if

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there was an agreement therefor, which does not seem to be questioned, he claiming that he had paid board for all but two weeks.

There was some evidence also tending to show an ante-muptial agreement, and that the \$1500 was given in pursuance to such agreement. The weight of such tentimony was not for the court but the jury, and under the circumstances it was error to give a directed verdict. Accordingly the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

Gridley, P. J., and Morrill, J., concur.

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79 - 27029

ELHA HANSEN.

Plaintiff in Error.

VB.

LESTER LARSEN.

SHROR TO SUPERIOR COURTY.

225 L.A. 649

MN. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This was a personal injury suit. Plaintiff in error was injured while riding in defendant in error's automobile. which he at the time was driving. Defendant's sister was also an occupant of the car and was riding in plaintiff in error's lap. It was a one-seated car and appearently afforded insufficient room for the three to sit upon one seat. The question for decision is whether the court erred in directing a verdict for defendant is error at the close of the evidence, which unquestionably presented a case for the jury as to defendant's negligence. It appeared therefrom that he had driven up behind a street car going in the same direction, which had stopped, or was just starting up, at a street intersection, and in turning to the left of the car to pass it, contrary to a city ordinance, thereby same into collision with another automobile whereby plaintiff was injured.

It is inferable from the arguments that the court directed a verdict either upon the theory that the proof did not show, as alleged in the declaration, that plaintiff was riding with defendant upon his invitation, or that she was not in the exercise of due care because she allowed his sister to sit in her lap. We think both of these questions should have been submitted to the jury. While it appears that

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 defendant, in compliance with a request or suggestion from his sister, drove his car and met the two ladies for the purpose of delivering Christman gifts from a charitable association with which they were connected, yet so think the circumstances might indicate an implied invitation on his part for claintiff to become his passenger, and that the question whether she exercised due care was purely a question of fact for the jury.

Accordingly we think the court erred in not submitting the case to the jury, and that therefore the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

Gridley, P. J., and Morrill, J., concur.

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P. S. NELLIS & COMPART, a corporation,

Appellant.

Vi .

ALEXANDED BARRETIES COMPANY, a corporation,

Appellena

APPRAL FROM MUSICIPAL COURT OF CHICAGO.

225 I.A. 643²

MR. JUSTICE BARKES DELIVERED THE OPINION OF THE COURT.

This is a suit for breach of contract to ship crated cabbage. The jury accessed demages at it. Whatever the morits of plaintiff's case or the rule of demages, as there was no, or at least insufficient, proof of any demages sustained, the judgment entered on the verdict must be affirmed.

The order was for a car of crated cabbage f.c.b.

Lan Senito, Texas. Defendant accepted a telegraphic order for
the same to be shipped april RS, seather permitting. The
evidence showed that the weather did not permit of shipment
on account of rain which prevented growers from outling and
hauling the cebbage. The shipment not being made plaintiff
telegraphed an inquiry April Rdth. Defendant replied that
it couldn't ship "crated" until the following week. On April
15th plaintiff wired to "express car" or it would buy in the
open market. Defendant wired an offer to ship the same day
but called for payment in advance of shipping because of
plaintiff's grange of order for expressing instead of freighting
the goods. Defendant's order of the 25th was not accepted.

Four days later defendant cancelled the offer for non-acceptance.

Plaintiff predicates its claim on the loss of an alleged difference between the purchase and market prices, but made no adequate proof of market prices on any particular date.

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or that it went into the market and bought goods to replace those ordered, or that it had said the goods contracted for, and had to replace them. The only avidence offered on the subject is that given by plaintiff's sales wanager, which is altogether too indefinite and speculative to wereant finding anything more than nominal damages. He said he went into the market and "purchased other cabbage to fill orders," but when, or where, and what he paid, whether more or less than what he was to pay defendant, do not appear from the evidence. Thile he also testified that there was an advance in the price immediately after the sale it is not clear what date he had reference to, his testimony being that he was familiar with the market between April 19th when the order was first given, and april 35th, or that the price was higher when delivery was required, or that he had any definite or exact information as to the market price on any particular date or dates. His testimony was too general and indefinite upon which to predicate an assessment of damages, assuming that plaintiff was entitled thereto. Accordingly the judgment will be affirmed.

APTIMED.

Gridley, P. J., and Morrill, J., concur.

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MERRILL C. MEIGS.

Appeller.

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EMERY MOTOR LIVERY COMPANY, a corporation, Appellant. APPHAL FROM SUPERIOR COURT, GOOK COUNTY.

225 I.A. E 13

MR. JUSTICE BARNES DELIVERED THE OFILION OF THE COURT.

Plaintiff was driving an automobile east on the south side of Oakwood boulevard, an east and west street, and defendant was driving one south on the west side of Ellis avenue, a north and south street, a residential district of Chicago, and the cars collided just south of the center of their intersection. Flaintiff sued for damages to his car and got judgment for \$735.25.

Appellant complains that the verdict was against the weight of the evidence both on the question of the exercise of due care by plaintiff, and negligence by defendant. We have reviewed the evidence, which consists mainly of conflicting versions of the affair given by plaintiff and the driver of defendant's car. But we find no justification therein for disturbing the jury's verdict, nor necessity for a detailed recital thereof. It clearly preponderates to the effect that plaintiff was not driving at excessive speed, that his car had reached the intersection first, that, as was his duty, he looked first to his right for cars approaching from the couth, and then to his left whence defendant's car was coming, and that defendant's driver, contrary to the rule to be observed in such a case, looked

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first to his left and then to his right, too late at the speed at which he was driving to avoid a collinion. The circumstances were such that plaintiff had under the statute the superior right of way over defendant's car coming from the north, as "all vehicles traveling upon public highways shall give the right of way to other vehicles approaching all intersecting highways from the right, and shall have the right of way over those approaching from the left: Provided," etc. (Sec. 33, Ch. 95a, Cahill's State. 1920.) The evidence indicates that the relative positions of the two cars were such just before the cellision that it was the duty of defendant's car to yield the right of way to plaintiff's, and of the driver to approach the intersection with his car under sufficient control to comply with the law in this respect. It is apparent that he did not exercise such care. The might was dark and the pavement slippery with ice, and he approached the intersection with a degree of speed indicating disregard of both of these conditions and of the difficulty in stopping his car for one having the superior right of way.

Appellant complains of a modification of an instruction tendered by it from which the court eliminated an hypothesis of fact predicated upon plaintiff's driving at a greater rate of speed than 15 miles an hour, and which directed a verdict in case of the jury's so finding. The instruction as modified fully etated the law applicable to such a state of facts, and we do not think the elimination of a specific application of it constituted reversible error.

Complaint is also made of an instruction as to the duty of defendant's driver to give the right of way to all vehicles ap reaching the intersection from his right, which stated that the failure to give the right of way to plaintiff was negligence. Thile the instruction is defective, yet as

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the evidence clearly indicates that both parties reached the intersection at approximately the same time, we think the jury probably regarded the instruction as applicable only to that state of circumstances. The instruction did not direct a verdict, and we do not think it calls for reversal.

AFFIRMUE.

Gridley, P. J., and Morrill, J., concur.

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RUDOLPH GUORG.

Appullee,

VB.

SAM LIEBERHAN.

Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

225 I.A. 6437

MA. JUSTIS BARNES D LIVETED THE OPINION OF THE COURT.

Plaintiff brought this suit to recover \$500 which he alleged he loaned to defendant. The latter claimed that such sum was given to him as security that plaintiff, a retail butcher, sould not buy ment from any other party than defendant. That ever arrangements they had were vertal and no other party was present when they were made.

It appears that one Kastren conducted a grocery store and leased out a portion of it for a butcher shop or ment store; that defendant ran the ment store for a while; that he was succeeded by another party who sold out his stock to plaintiff, and that the latter ran it thereafter. Defendant, herever, continued paying rent to Kastren until some time after plaintiff took possession and the occupant reimbursed him therefor. Finally plaintiff paid the rent directly to Anstron. There was no lease for any specified time and Lastron was indifferent who secupied that portion of the store so long as he received the rent. There appears to have been no contract whereby plaintiff was abligated to pay rest to defendent or any consideration to support an agreement, if one existed, to buy meat of defendant only. Plaintiff denied that there was any such contract, and there was no syldence except defendant's that there was. The burden rested upon him to sustain his

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defense that the \$500 was put up as security for the enforcement of such an agreement. Even if there had been such an arrangement it does not follow that the \$500 would be forfeited as liquidated damages, and there is no proof that he suctained any damages. We think the jury were justified in finding that the money was loaned to defendant.

AFFIRMED.

Gridley. P. J., and Morrill, J., cencur,

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CLAIM OF CALVIN STEWART, executor of the lest will and testament of MARCARATHA HORRE, deceased. Plaintiff in Error.

WB.

deceased.

Defendant in error.

GEROR TO SIRCUIT COURT, COOK COUNTY.

225 I.A. 6435

MR. JUSTICS MCHRILL DELIVERED THE OFINION OF THE COURT.

by Calvin Stewart, executor under the last will and testament of Margaretha Bohra, deceased, against the estate of Cherles B. Mehren, deceased, to recover \$500 and interest thereon, alloged to have been loaned by said Margaretha Bohra in her lifetime to Mehren, who was her brother-in-law. The claim was based upon a note alleged to have been executed and delivered by Vehren, which it is stated has been lost or mislaid, thereby preventing its production in court. An appeal was taken to the Circuit Court from the order of the Probate Court disallowing the claim. There was a jury trial in the Circuit Court resulting in a verdict and judgment against the claimant and in favor of the estate of Tehren. Appellant contends that the judgment is contrary to the law and the evidence.

Upon the trial of the case the claimant testified in his own behalf. His testimony as to conversations with Webren was clearly inadmissible, but no complaint is made or that account. A memorandum kept by Wargaretha Bohrn in her lifetime was received in evidence. This document contains words and figures evidently relating to sundry charges and receipts on account of interest. Its connection with the subject-matter of the case was not shown.

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It does not on its face appear to be an account with Mehren. The court preparly refused to allow certain other witnesses who were called to testify on behalf of complainant for the reason that they were interested parties and disqualified under the statute.

The claimant had the burden of proving the existence of the debt. He failed entirely in this respect. The record contains no evidence which would have justified the jury in finding the issues for the claimant. There is no reversible error in the record.

The judgment of the Circuit Court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

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GRORGE LUKIC.

Appellee,

YS.

APPEAL FROM CIRCUIT COURT. COOK COUNTY.

THE METEOPOLITAN LIVE INSURANCE COMPANY, a corporation.

Appellant.

235I.4644

MA. JUNEICA WORKILL PALLYS OF THE SPENIOR OF THE COURT.

This is an appeal from a judgment of the Circuit Court of Cook County for \$492.33 upon a verdict for that emount in favor of appellee, who was plaintiff in the court below. action is based upon a policy of insurance issued by defendant on the life of Kata Lakic, wife of the plaintiff, for \$500, dated January 2, 1917, and payable to plaintiff as beneficiary. The declaration set forth the terms of the policy and alleged full compliance therewith on the part of the insured. A plea of the general issue and thirteen special pleas were filed by defendant. These special pleas alleged that certain statements in the application for incurance, which formed a part of the policy. were untrue, and particularly those relating to the prior illness of the insured and the character, symptoms and treatment of the same and the present and past physical condition of the applicant, and that by reason thereof the plaintiff is precluded from recovering.

The application which formed a part of the policy contained signed declarations by the insured that the statements and enswers to the questions of the defendant's medical examiner therein contained were true, and formed the basis of the contract of insurance and that all such statements were made as an inducement to the company to issue the policy. The statements which are alleged to be untrue were to the effect that the applicant

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had never had consumption, discuss of the lungs, habitual cough or spitting or raising blood; that she was in sound health and had no physical or mental infirmity of any kind; that she had not been under the care of any physician within two years; that she had never been under treatment in any dispensary, hospital or asylum or been an inmate of any almo house or other institution, and that she had never been seriously 111. The application was made Nevember 19, 1916. The policy was issued January 2, 1917. The insured died of consumption June 3, 1917, at the Cook County Hospital.

The evidence sustains the contention of appellant, and it is practically undisputed, that many of the applicant's answers as to her present and past condition of health were untrue. These answers were material to the risk and constituted the basis of the contract of insurance. The policy was issued in reliance upon them. Their falsity would furnish ample ground for a reversal of the judgment herein were it not for the fact that the policy upon which the action is based contains the following provision:

"This policy (and the application therefor) constitutes the entire contract between the parties and shall be incontestable after one year from the date of its issue except for non-payment of premiums."

This feature of the policy is expressly recognized by
the statutes of this state relating to the subject. (takill's
statutes, chap. 73, section 375, paragraph 3.) It is true, as
suggested by appellant, that the case was not tried upon this
theory and the incontestability of the policy was not considered
upon the trial, but it has been repeatedly held that the beneficiary
can avail bimself of such a provision when the case is under
consideration by a reviewing court.

In Zink v. supreme Ledge of Knights of Pythise, 217 III.

App. 54, the case was tried in the lower court upon the theory of suicide, but this court in its opinion gave effect to the incon-

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Life Insurance Co., 383 Ill. \$36, the defense was based upon the alleged breach of sarranty contained in the application and not upon the ground that the policy had been procured by fraud, and the case was tried upon that theory, but the court held that the plaintiff was entitled to judgment for the reason that the policy contained a prevision that it should be insontestable after two years except for fraud. In the case at bor the incontestability clause is absolute, except for non-payment of presides, which is not relied upon as a lafance. In the recent case of 1.2.7.4 St.

L. By. Co. v. Chicago City Mys. Co., 300 Ill. 168, it was held that this court is suthorised to pass upon both the facts and the law, even though no propositions of law were held by the trial court.

contract to ascertain all the facts material to its liability and cancel or rescind the contract within the period of one year or be barred from thereafter contesting its liability under the policy. The right of the appellant to rescind the policy was neither enlarged nor abridged by the death of the insured. The prevision that the policy shall be incontestable after one year from its date except for non-payment of promiums bars the company from contesting the pelicy on any ground except for non-payment of premiums if the insurer has had the full year in which to take action to void the policy. Remany v. Old Colony Life Ins. Co., 297 Ill. 692. After the lapse of the poriod of one year, even frond is not available to void it. Flanagan v. Federal Life Ins. Co., 231 111. 399.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

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20 - 26836

LOLORON JASKEN, Defendant in Error,

VB.

STATE COMMERCIAL AND SAVINGS BANK, a Corporation. Plaintiff in Street ERROR TO MUNICIPAL COURT OF CHICAGO.

22 114 844

IN. JUDIES MOUNTLE DELIVERED THE OFINION OF THE COUNT.

ment of the Bunicipal court of Chicago for \$523.56 against the plaintiff in error, who was defendant in the court below, and in favor of defendant in error, who was plaintiff below. Plaintiff's statement of claim shows that the action was brought to recover damages alleged to be due plaintiff on account of the alleged breach by defendant of a certain written agreement between the parties dated March 1, 1917, by the wrongful discharge of plaintiff from his employment by defendant on June 17, 1917. Defendant's affidavit of series device that plaintiff fulfilled the conditions of the agreement to be kept and performed by him, and that the discharge of plaintiff was wrongful. There was a jury trial resulting in a verdict and judgment for \$523.55.

fendant employed Jesmer as manager of its foreign department relating to Mussian and Polish trade for one year at \$30 per month for the months of March, April and May, 1917, and \$100 per month thereafter, and in addition should pay plaintiff a commission of 15 per cent of the net profits realised from the Mussian and Polish trade. Plaintiff agreed to devote his entire time and efforts to the business and to use every effort to promote and successfully conduct the same. The other provisions of the agreement are not material to the consideration of the present A in his hardware a nature to come your to have not

AT ALMS SCREENING BRIDTON BIS TO PROPERT SERVICE BUT THE PROPERTY SERVICES BUT TO PROPERTY SERVI

case. Plaintiff's ealary was paid to June 17, 1917, which was the date of his discharge by defendant, and the judgment is for unlary for the balance of the pariod between that date and Karoh 1, 1918, less the amount earned elsewhere by plaintiff during that pariod.

The syldence chave that for the first few weeks after the suplayment gemmenced plaintiff was fairly attentive to his duties and constant in his attendance at his employer's place of business, although his efforts were unproductive of any of the results contemplated by the agreement. He profits were derived from the department under plaintiff's charge. 'thereafter his conduct became uncative actory. It was the subject of reposted complaints from his amployer, whose officers a went to obtain information from plaintiff as to how he was even ing the large amount of time when he was not at his employer's office. He was frequently absent from defendant's place of business during business hours for large portions of the day. He slained to be out of the office verting up business for his employer, but refused to furnish the names of persons upon when he had called or to give anything more than a very general account of his motivities. He said that he was soliciting accounts for the bank, although he was not employed for that purpose. He refused to give the mass of the persons solicited. The evidence further shows that during the period of his employment plaintiff was intorested in newspaper work and devoted more or less time to it. Four witnesses testified to those facts. It is true that they are officers or employes of defendant, but they are not more interested in the result of the suit than Plaintiff, she was practically the only witness on his side of the case.

The contract between the parties required plaintiff to devote his entire time and all his efforts to the service of

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the defendant. The great weight of the evidence shows that plaintiff failed to fulfill this important condition of the agreement. For that reason defendant was justified in discharging plaintiff and there can be no recovery by him on account of his salary for the remainder of the period covered by the contract.

The judgment of the Municipal court was contrary to the manifest weight of the evidence and is therefore reversed with a finding of facts.

REVERSED WITH SINDING OF FACTS.

Gridley, P. J., and Barnes, J., concur.

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PERMING OF PACTS:

The court finds as ultimate facts in the case that plaintiff violated his contract with defendant and did not asvote his entire time and all his efforts to the service of defendant.

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DUNNORS WURSTED GO. Inc.

VO.

A. SITHON & CO., a derporation,

APPEAL FROM MUNICIPAL OCURT OF CRICAGO.

665 I.A. 5443

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

Plaintiff's statement of claim, filed June 28, 1926, alleged that on or about Jamuary III, 1970, plaintiff contracted with defendant for the sale to the latter of 50 please of serge centaining approximately 3800 yards at a price of \$4.50 per yard, to be delivered during February and March, 1926; that on February 17, 1980, plaintiff delivered to defendant 11 pieces of said perchardise, containing approximately 850 yards of the value of \$3429.60, which was paid by plaintiff in accordance with the contract; that during the months of Pebruary and March, 1920, plaintiff delivered the remaining 30 places, containing 2000 yards approximately, the value of which, at the agreed price, was \$11,886.75, which became due and payable under the terms of the centrast May 1, 1930, and that defendant failed and refused to pay any part of said sum. By its affidavit of serits defendant denied the existence of the contract mentioned and its liability to pay said sum. It admitted its refusal to pay, but alleged that there was nothing fue under the contract. It further averred that under the contract made by defendant with an agent of plaintiff it was agreed that defendant could pay for the aerohandise four months from delivery with a discount of 7%, or sould pay in thirty days with a discount of 10% at defendant's option and that said four months had not elapsed at the time of bringing the auit. It further alleged that the goods delivered by plaintiff were not according to the sample but inferior thereto, and that upon the

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receipt of said goods defendant notified plaintiff of such inferiority and cancelled its order for the balance of the goods.

By an assendant to the affidavit of merits filed February 14,

1921, defendant denied that it ever entered into the contract specified in the statement of claim and alleged that said alleged contract is uncertain, indefinite and unenforcible, and that if there ever was such a contract it was duly cancelled by defendant before plaintiff acquired a right of action thereon. There was a trial before the court without a jury, resulting in a finding and judgment in favor of plaintiff for \$11,886.75.

Appellant secks a reversal upon the ground that the judgment is contrary to the law and the evidence, basing his contention upon the theory that there was no contract between the parties and that the alleged agreement upon which appellee relies was uncertain, indefinite and unenforcible; that it was veid for lack of mutuality and that defendent had a right to cancel, and did cancel, the same February 17, 1920. These contentions were embedded in certain propositions of law and fact which defendant submitted and which the trial court refused to hold.

Substantially all of the evidence relating to the transaction is included in a stipulation between the parties, from which it appears that on Jamuary 22, 1820, defendant gave to one ling, a salesman of plaintiff, an order for the 50 pieces of goods in question. Hing had no authority to accept or reject the order and was empowered only to receive the same and transmit it to his principal, which he did. This order provided for a discount of 10% if payment was made in thirty days and of 7% if payment was made in four months. The order was accepted by plaintiff without change, except as to the torms of payment. On Jamuary 31, 1930, plaintiff sent to defendant by smill a confirmation of the order,

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which specified the 50 pieces of goods at the price mentioned in the statement of claim. It also stated the conditions of sale, which were, in substance, that the agreement was contingent upon strikes, accidents, delays of carriers or other delays beyond the control of the vendor; that all goods were sold f. o. b. will and all deliveries consumented at the point of shipmont; that the order was given and accepted upon the condition that the delivery of goods thereunder should be subject to a credit limit -high might be fixed by the venier at any time during the execution of said order; that no goods shall be returned or allowances made for any cause after thirty days from delivery or after goods are sconged or cut; that a discount of 10% is allowed if payment is made within thirty days: that the order is accepted subject only to the procuring of the necessary yarns by the vendor and might be reduced in quantity or cancelled estirely in accordance with the bility of the vendor to manufacture; that in dysing the cloth the vendor will use the best materials obtainable but does not guarantee the results. The letter specified the only terms and conditions upon which the order was accepted by the vendor, and the vender was instructed that if these terms and conditions were not in every way correct, the letter should be returned to the vendor immediately. Plaintiff was a manufacturer of cloth and defendant was a manufacturer of clothing.

The president of defendant company, who was the only witness upon the trial, stated that this letter was received by defendant but that he gave it no particular attention and did not notice the terms of payment specified. If the conditions of the proposed sale were unsatisfactory to defendant, it should have notified plaintiff premptly to that effect, as instructed in plaintiff's letter, in order that plaintiff might not be put to

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the expense of manufacturing or shipping any part of the order. We such notice was given.

Prior to February 17, 1920, plaintiff shipped 11 pieces of the goods to defendant, which were accepted and paid for by defendant upon the terms mentioned in plaintiff's letter of confirmation. Thereafter a considerable correspondence engued between the parties. Much of it relates to the claim of defendant that the goods did not conform to the sample submitted. As this defense was withdrawn upon the trial by stipulation, it is unnecessary to discuss those portions of the correspondence which relate therete. The remainder of the correspondence indicates the dissatisfaction of defendant with the terms of payment arcoified in plaintiff's letter of January 31, 1980, and it is claimed that it was entitled to the alternative terms specified in the original order given to hing of payment within four months with a 71 diacount instead of payment in thirty days with 10% discount, as specified in plaintiff's letter of January 31, 1930. The testioony of the president of defendant company shows that there was a decline in the price of these goods in the number of 1900. We regard a discussion of this correspondence as wholly immaterial, and therefore unnecessary, for the reason that defendant had ratified the terms of his purchase as stated in plaintiff's letter of January 31, 1910, by failing to reject them promptly upon receipt of that letter and by accepting and paying for a considerable portion of the morehandise covered by the order upon the terms therein specified. The record does not show that defendant ever repudiated the purchase. In its correspondence defendant claims that the goods were inferior to the sample, being "too light" (whether in color or weight is not stated) for its use, out on the trial abandoned this ground of defense. Defandant also found fault with the terms of payment, but it ascepted

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and paid for 11 pieces of the goods upon the terms specified by plaintiff. Plaintiff's letter of January 31, 1930, and the acceptance by defendant of the conditions therein stated, constituted the contract between the partice, which was certain and definite in its terms. After acceptance of plaintiff's terms of sale and a partial performance by plaintiff, defendant had no right to repudiate the contract and demand a cancellation of its order.

The contract was not void for lack of mutuality. Dofendant's contentions in that respect are based upon the conditions specified in plaintiff's letter or confirmation to the effect that the agreement was contingent upon strikes or other delays beyond plaintiff's centrel and was subject to the ability of plaintif to procure the necessary yarns. These conditions do not bring the contract within the class of cases cited by appellant holding contracts you'd for lack of mutuality where one party is bound and the other reserves the right to cancel or assumes no obligation whalever. Vegel v. Pekoe, 157 Ill. 539; Olsen v. Whiffen, 178 Ill. App. 182. Conditions of this observers, exqueing one of the parties from performance or from Hability resulting from failure to parform in case of the occurrence of events beyond the central of such party, does not render the contract void for lack of mutuality. Ordinary business prudence requires that such reservations be unde. unless the party intends to bind himself to purforwance at all hazards. Asserdingly, it is customary to embody in contracts suitable provisions excusing performance and exempting a party from liability for non-porformance is case performance is prevented by fire, flood, embargoes, strikes, locacuts, crop failures and other causes beyond the control of the party failing to perform. Such provisions do not render the centract void for lack of our tuality. 3 Williston on Contracts 1968; 13 C. J., p. 337, sec. 187, and eases cited. Plaintiff fully performed his obligations

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man of the contract of the state of the state of the state of the state of the course and an anticontinue in builds a vitracion of believing MATERIAL STATE OF THE PARTY AND ADDRESS OF THE PARTY ADDRESS OF THE PARTY AND ADDRESS OF THE PAR printing or other or or forces one but Jopens affiliately MATERIAL TO A LANGUAGE WHILE ARREST DESCRIPTION OF THE PROPERTY AND ASSESSED. THE RESIDENCE OF PERSONS AND ADDRESS OF THE PARTY OF THE and has been all places on beautiful places in the color of the filter black made period of the second of these at the court of the contrast well-THE RESIDENCE OF THE PARTY OF T MARKET THE REAL PROPERTY AND ADDRESS OF THE PARTY AND ADDRESS. WHEN HE SHALL SHAL The above and the control of the con រដ្ឋក៏ស្រែកការ () ខេត្ត ស្រា កំណែន វាស្ថាសំខាត់ មានី ជាកាក់ការ ការ ការការ **ក្**បូស៊ីនិការ person of the contract of the aprile was a common about the cold of the first the first of the great training handre, the relation of the second of the se grand to the common service of the particular points from the first to Section to the control of the property of the control of the contr វត្ត ស្រាន្តាតែង គ្រោត រួមនេះ ស្ថាន ប្រសាស្ត្រាស់ ប្រែសិក្សា ប្រាសាស្ត្រា ស្ថាន និង ភូមិសំដី ១៩ personal of partiest camp and or bridge and development policy wall gar taut product is in page work to make the and territory significant was a first or and an in the street of the annual of the applicate rational programmes and the second se

under the contract between the parties and is entitled to recover for merchandise sold and delivered at the stipulated price.

The judgment of the Municipal court is affirmed.

AFFILLION.

Gridley, P. J., and Barnes, J., concur.

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STATE

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DAVID M. WOLFT.

B. M. SHARPE, receiver.

Appallant.

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Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

025 I.A. 644

MR. JUSTICE MORRILL DELIVERED THE OFFNION OF THE COURT.

The appellant in this case took judgment by confession against appelled in the Municipal Court of Chicago on Luguet 25, 1920, for 180 and costs. The judgment was entered by virtue of the warrant of attorney contained in a certain lease from appellant to appelled. On September 1, 1920, on motion of appelled, leave was given to it to plead to the declaration, and it was ordered that the judgment previously rendered stand as security. The case was heard by the court without a jury. There was a finding and judgment against plaintiff, who has appealed.

the lease demised the premises known as flat No. 2 on the second floor of the building at 5209 Ingleside avenue. Chicago, for a period of one year from May 1, 1920, to April 30, 1921, at a rental of 490 per month, payable in advance. After the lease was executed the lease, who is appelled here, paid \$30 on account of the first month's rent. On May 1, 1920, he notified plaintiff that he would not take possession under the lease, stating as his reason for his refusal to do so that the premises were in an unsanitary condition. On that date plaintiff received by mail a check from defendant dated April NO, 1920, for 100, being the balance of rent due for the month of May, 1930. The check was deposited and was returned to plaintiff marked "payment stopped."

Defendant failed to take possession of the premises pursuant to the lease and thereupon plaintiff re-rented the premises at 190

per month for the balance of the period to april 30. 1921, and took judgment against defendant as stated, the amount of the judgment consisting of the item of \$60 for the balance of the May rental and \$20 attorney's fees.

referdant's affidavit of merits denied any indebtedness to plaintiff and alleged that he had paid to plaintiff the sum of \$94, of which amount \$30 was to apply upon the first month's rent and \$64 was peid by defendant to apply upon the cost of closning and decorating the premises, the estimated expense of which was \$124. The affidavit further alleged the unassitery condition of the premises, which constituted his reason for failing to move into the premises. We claimed that the \$64 paid by him for decorating expenses should be applied on the rental account, leaving plaintiff indebted to defendant in the sum of \$4. The case was heard by the court without a jury, the trial resulting in a finding and judgment in favor of defendant.

that the lessee has examined and knows the conditions of the premises and has received the same in good order and repair and that no representations as to the condition or repair thereof have been made by lessor prior to the execution of the lease that are not therein expressed. It has been held repeatedly that there is no implied contract on the part of a landlord that the demised premises are tenentable or that they will continue so during the term and that when a lessee enters into a lease covenanting that he has received the premises in good repair and agrees to keep the same in repair at his own expense, there is no implied covenant on the part of the lessor to keep the premises in a tenantable condition. The lessee takes the premises as he finds them and must hold them subject to whatever covenants his lease contains. Friedman v. Schwabacher, 64 Ill. App. 422; Satzen v. Neulton, 106 Ill. App.

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560; Blake v. Hanous, 25 id. 486. The failure of the lessee to take possession of the premises is not a defense to an action for the rent. The demised term commenced May 1, 1990, and from that date the leasehold interest in the premises was vested in defendant for the term specified. His interest in the premises was definitely fixed and settled by the contract from the date of his delivery. If he elected not to take the premises or to abandon the same, he did so at his own risk. His liability does not depend upon possession. Landt v. McCullough, 181 Ill. App. 328; Kayer v. Laurence, 38 id. 194; Fabcock v. Leaville, 56 Ill. 461.

It is undisputed that the proposed lesses required the redeceration of the flat, the estimated cost of which was \$124, and that the lessee agreed to pay \$64 of that amount. Appellee requested that this work be done and agreed to pay a portion of the expense. He fulfilled this agreement and if he then decided to abandon the lesse he cannot recover for the expense which he incurred upon his own request and for his benefit. The lessee violated the contract embodied in the lesse and was therefore liable both for the rent and the additional expense incurred for decorating.

For the reasons indicated, the judgment of the Nunicipal Court is reversed and the case remanded with instructions to vecet e the judgment of Narch 12, 1921, and to enter in its place and stead a judgment in the following form:

"Therefore it is considered by the court that the judgment entered herein on August 23, 1930, in favor of plaintiff and against defendant for 186 and costs of suit stand in full force and effect as of the day of its rendition."

REVERSED AND REMANDED WITH DIRUCTIONS.

Gridley. P. J., and Barnes, J., concur.

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process of process for parties

MIDLAND OPERATING CVAPANY, & Corporation, for use of MIDLAND INVESTMENT SCHPARY, & Somposation, Plaintiff in Error,

YS.

Corporation, Defendant in Error.

ennor to Superion Court of Cook County.

225 I.A. 6445

MR. JUSTICE MORRILL DULIVERED THE OFISION OF THE COURT.

Plaintiff in error secks the reversal of a judgment against it in an action of assumpate which it brought in the Superior court of Gook County July 21, 1919. Plaintiff is an Arizona corporation and defendant a Visconsin corporation.

Plaintiff's claim is based upon the alleged liability of defendant under a certain contrast between them dated August 31, 1915. On that date defendant was known as the Budger Caspalty Company, but thereafter changed its name to that of Midland Unswalty Company. On the date of the contract there was in existence an Illinois corporation known as the Midland Casualty Company, between which and the plaintiff there had been prior business relations. The contract of August 31, 1916, recited the execution of a certain other contract dated September 23, 1913, between the Midland Consulty Company, an Illinois corporation, and the plaintiff, charaby that company agreed to pay plaintiff a certain fixed payconters upon the gross premiums collected by the Casualty Company from the sale of issued personal accident and health policies/and to be issued by the Casualty Company between the years 1914 and 1935. It also recited that the Padger Casualty Josephcy (which is new known as the Eidland Commanty Company, a Wiscensin corporation) had communicted an a recment with the Midland Casualty Company of Illinois to reinsure all

್ರ∤ - ಸ್ವತ್ತರ ನಿ. ಈಗಿರು ಈಗಿಗೆ 1. ಇತ್ತು ಸಂಪರ್ಗಳ ಅಭಿಸ್ವಾಸನ್ ಸಂಗಾರಕ್ಕೆ ಅಂತಿಗಳು ಕೆಂಗಳ

of cartain lines of policies previously leaved by the allients company as of June 30, 1915, and that it was the accirc of all three of the companies mendioned is charel said contract of dependen 25. 1913. In intul inco a new agreement in live of all prop agreement between the didland Jaquarty Jospany of The nois and plaintiff. this agreement the Badger Casualty Company agreed to pay plaintiff complexions at limed rates on the various lines of business acquired under its contract with the Milland behaving burgan; of Itimois, and that the payments should be asses soci-ammain on the with days of January and July of each year, accompanied by a written excessent showing the cellections during the period for which payment was being made. Under this confirme plaintlif covenanted to cooperate in every way removably within its power to facilitate the transfer of the insurance business of the disland basualty tempony (scaning the Illinois company) to defemiant. There were attached to this contract as Tabloit "A." a copy of the splement between the sidland Canalty Company of Illinois and the plaintiff, dated Reptember 23, 1914, which - provided for the payment by the Casualty Company to the operating Compary of action fixed percentages on presimes collected by the annualty Company, and as Inhibit "I." the agreement between the Hadger deposity Company and the Addand Cisualty company of things a providing for the assignment by the allinois company to the Visconsin company of all of the right, table and interest in policies is med by it prior to and in additiones on Ame 30, 1916, and for the assumption by the Visconsin company of the risks under said policies.

It is undisputed that plaintiff fulfilled its obligations under the contract of August 31, 1915; that the siniand Casmatty Company of Illinois transferred its business to the Badger essently Company in accordance with its agreement; that the hedger essently Company subsequently changed its most to that of the Midland Casmatry Company; and that several payments were made by defendant to plaintiff under the

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agreement of August 31, 1915, but that no payments were made for the first half of the year 1917 and for the subsequent samiannual periods.

Several pleas were filed by defendant, but it is necessary to consider only one of them, as no evidence was introduced by defendant in support of the remaining pleas. By its third plea defendant alleged that plaintiff is an Arizona corporution organized on or about December 22, 1908; that the purposes for which it was incorporated were to act as insurance agent, financial agent, broker or fiscal agent for other corporations: to own, handle and control letters patent and inventions and shares of its own capital stock and that of other corporations and to vote any shares of stock of other corporations owned by it; to borrow money and to issue bonds, notes and other evidence of indebtedness and accure the payment of the same by mortgage, deed of trust or otherwise; to do a general manuf cturing and mercentile business and in general to do and perform such actions and transact such business in connection with the foregoing objects not inconsistent with law in any part of the world as its board of directors might doem advantageous, and that plaintiff's articles of incorporation provided, among other things, that plaintiff's principal place of business outside of the territory of Arizona should be at Chicago, Illinois. The plea further avers that beginning with December, 1910, plaintiff commenced the transaction of the business at Chicago for which it was incorporated and that thereafter and ever since plaintiff maintained an office in Chicago for the transaction of said business and held all of its corporate meetings within the State of Illinois. The plea further averred that plaintiff was never at any time licensed or authorized to transact business in the State of Illinois and had never complied with the provisions of the Illinois law regulating the admission of foreign corporations for pecuniary

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profit to do business in the State of Illinois, but that on the contrary, had transacted its ordinary business in that state in violation of the laws of Illinois. The plea further every that the contract of August 31, 1915, was made in the State of Illinois and was to be performed therein and that at the time of the execution thereof Illinois in violation of the laws of that state, by reason whereof the said contract of August 31, 1915, is mall and void and the plaintiff prohibited from maintaining any action thereon in the courts of the State of Illinois.

The execution of the contracts mentioned is not denied and there was evidence tending to austain plaintiff's claim. At the close of plaintiff's case a motion was made by defendant for an instructed verdict in its favor, which was denied by the court. Thereupon a large amount of evidence was introduced tending to show the nature of the business which had been conducted by plaintiff in the State of Illinois commencing in the year 1908, and for several years subsequent thereto, from which it appeared that plaintiff had maintained an office in Chicago and a clorical force for the transaction of its business and had entered into contractual relations with the Midland Country Company of Illinois for the sale of stock and policies issued by the latter, and that it had at all times furing said period, and afterwards, maintained a bank account in different banks in the City of Chicago. It appears, however, from the evidence that plaintiff had transacted no business in Illinois subsequent to September, 1913. The secretary and treasurer of the plaintiff corporation testified that plaintiff had not sold any of the stock of the kidland C sualty Company after optimber 3, 1913, and that it had never sold any insurance or insurance contracts or established any insurance agencies or an effice ferce or employee in the City

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hept in Chicago after September, 1915, and that the only business done after that date was the collection of the commissions due to it under its contract with the Midland Gasualty Company of Illinois of Reptember 33, 1915, and its subsequent contract of august 31, 1915, with defendant. It kept a bank account in Chicago during 1914 and subsequent years, but the transactions in 1914, 1915 and 1915 were few in number. Turing the year 1917 there was one credit and no debit transactions, and since that time there has been a balance of 8.99 in the account. The balances during the entire period since 1914 were small and generally less than \$100 at any time. At the close of defendant's testimony the motion for an instructed verdict in favor of defendant was renewed and was allowed by the court and judgment was entered accordingly.

The statute of the State of Illinois provides that no foreign corporation doing business in this state without a license shall be permitted to maintain any suit at law or in equity in any of the courts of this state upon any demand, whather arising out of contract or tort. Cahill's Statutes, chap. 32, sec. 94. It is admitted by plaintiff that it has no license to transact business in the State of Illinois, but plaintiff insists that since September, 1913, the only business transacted by it in this state was the single transaction with the Midland Casualty Company of Illineis embedded in the contract with that company of September 33, 1913, and the agreement substituted therefor with defendant dated August 31, 1915. Defendant's motion for an instructed verdict seems to have been allowed upon the theory that defendant had established an affirmative defense, which was not contradicted or explained by any rebuttal testimony on the port of plaintiff and that defendant's testimony fully established the facts necessary to support such defence, thereby rendering it proper to direct a verdict for defendant. Sallner v. C. ". Co.o.

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245 111. 148.

As we view the case, the validity of the defense that plaintiff is precluded from recovery upon the ground that it was unlawfully doing business without a license in the state of Illinois must be determined by the facts and circumstances shown regarding the business conducted by plaintiff on Jugust 31, 1915. and subsequent thereto. Nuch evidence was introduced upon which defendant's organest is bood to the effect that for several years prior to Jeptember, 1913, plaintiff was transacting some of its corporate business within the state of Illinois without a license, but such argument is predicated upon inference rather than upon specific proof. There is no svidence showing that plaintiff, ismediately prior to and on and subsequent to august 51. 1915, was transacting any business in the state other than the receipt of the commissions accruing to it under the contract with defendant. The business which a foreign or paration is prehibited from transacting in the Utata of Illinois without a license is that which is done in accordance with the charter powers of the corporation which were conferred upon it by the state where it was incorporated, and not such acts as are essential to the proper management of its internal affairs. Alpena Co. v. Jonkins, D44 Ill. 354; Tandel v. bwan Land Co., 154 id. 177; gradbury v. sakegan Co., 113 Ill. app. 500. Accordingly, It has been held that maintaining an office for the convenience of agents and employee and for the administration of the internal affairs of a corporation does not constitute a violation of the statute. isolated business transactions, giving notes or obligations for indebtedness, purchasing supplies and making collections, have been held to be acts which a foreign corporation can perform in this state without the necessity of securing a license to transact business. Boos v. T. & F. Ry. Co., 250 Ill. 376; Plew v. Board, 274 id. 232;

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Bradbary v. toukegen Co., 213 Ill. App. 600.

We are of the opinion that the trial court was not justified in directing the jury to find the issues for defendant, and that the case should have been submitted to the jury. The evidence of an affirmative defense was not sufficient to varrant the court in failing to observe the rule that if there is any evidence in the record, which, standing alone, tends to prove the material allegations of the declaration, the motion for an instructed verdict should be denied, even though the court is of the opinion that a verdict for plaintiff if given must be set eside as against the prependarance of the evidence.

Libby, mescal & Libby v. Cook, 222 711. 206.

The judgment of the Superior Court is reversed and the case remanded.

MEVERSED AND REMANDED.

Gridley, P. J., and Barnes, J., concur.

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121 - 27071

KATH RINE TOWASIAVICE, administratrix of the estate of Frank Tamasicwicz, deceased,

appellant.

GIRCUIT COURT.

VIII .

JOHN BAHTON PAYNE, Director General of Mailroads, Agent of the United States,

Appellee.

225 I.A. 645

HR. JUSTICE MORRILL DELIVERED THE OFFEION OF THE COURT.

defendant was operating the railroad of the Chicago, Milwaukee & St. Paul Reilway Company as a common carrier engaged in interstate commarce, using certain railroad yards belonging to that company in Chicago, that the decedent, Frank Tomasiewicz, a car scaler sorking in said yards, was killed as the result of an accident caused by defendant's negligence in auddenly moving certain cars without giving any serning to the decedent. There was a verdict and judgment in favor of defendant. A reversal is sought on account of alleged arrors of the trial court in giving and refusing to give certain instructions. No other errors are mentioned as grounds for reversal.

It is undisputed that the accident occurred on the date alleged, resulting in the death of Tomasievicz; that the decedent was an employe of defendant engaged in interstate commerce; and that the proceedings in the case are governed by the Federal Employer's Liability Act of April 32, 1908. Under the provisions of this act (sec. 3) the fact that the employe may have been guilty of contributory negligence does not bar a recovery, but the damages are subject to disimution in proportion to the negligence attributed to the employe.

The effect of decedent's contributory negligence, if any, as

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provided in the set, was stated correctly in one of the instructions given, (I. 2. 1. 1. 25. v. kages, 340 U. s. 66) but was erroneously presented in the following instruction given at defendant's request.

"The court instructs the jury that Frank Tomasiewicz was bound by law to use his senses to ascertain the ordinary dangers incident to the work in which he was engaged, and that this duty was upon him not only at the immediate time of the accident in question, but also for such time prior thereto, as he may have had occasion for exercising such precsution, if any, and if you believe from the evidence that Tomasiewicz neglected to use his senses with ordinary care and prudence for his own safety and was injured in consequence of such neglect, he is not entitled to recover a verdict against the defendant."

This was a peremptory instruction and was not oured by another instruction correctly stating the law upon the subject. It is impossible to say that the jury did not follow the erroneous instruction. Pardridge v. Outler, 168 Ill. 504.

under the Federal Employer's Liability Act, contributory negligence of the employe may constitute a defence if proved to be the sole cause of the accident, (Great Northern My. Co. v. Files, 240 U. A. 444) but it does not appear from the pleadings or proofs that the question of contributory negligence of the employe was an issue in the case at ber. Under the rule announced in Central Verment My. Co. v. Thite, 238 U. D. 507, the burden of proving contributory negligence rested upon the defendant. Therefore we think that the jury may have been misled by the eleventh instruction, by which they were directed to find the defendant not guilty in case they believed from a prependerance of the evidence that the futal injury was caused solely by the employe's negligence.

These erroneous instructions require a reversal of the judgment, and we shall therefore refrain from any expression of our views as to the scope or weight of the svidence, except in so far as it relates to an assumption of risk by the supleye which was pleaded by defendant. We think that there was evidence tending

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239 Fed. L. We do not find that the phraseology employed in these instructions confused the question of assumed risk with that of contributory negligence, as contended by appellant.

Incept as above noted, we find no reversible error in the giving or refusing of instructions.

The judgment of the Circuit Court is reversed and the case remanded.

REVERSED AND REMARDED.

Gridley, P. J., and Barnes, J., concur.

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130 - 27081

GUNBINSKY BROS. COMPANY, a corporation,

Appellant,

VB.

MULLEN BROS. PAPER COMPANY, a corporation,

Appelles.

APPEAL PROM MUNICIPAL COURT OF CHICAGO.

125 I.A. 6453

MR. JUSTICE MONUILL DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Nunicipal Court of Chicago entered June 30. 1921, veceting a judgment for 39.665.46 entered April 4. 1921, in favor of plaintiff. The judgment was by a Tault on account of defendant's failure to file as affidevit of defense within the time limited by the court.

Plaintiff, who is appellant here, contends that the petition to vacate the judgment and the affidavit is support thereof did not show a maritorious defense and did not set forth facts and circumstances sufficient to justify the court in vacating the judgment and that section 21 of Municipal Court act authorizes the court to set saide a judgment more than thirty days after its entry only upon such a showing as would oustain a bill in equity for that purpose. It is urged by appelled, who was defendant in the Municipal Court, that the order vacating the judgment was interlocutory only, and for that reason the appeal should be dismissed, as section 91 of the Fractice Act permits appeals only from final judgments, orders and decrees.

It has been held repeatedly that the proceeding to vacate a judgment under section 39 of the Proctice Act is a new suit and that the order of the trial court therein is final and appealable. Gremer v. Traveling Men's association, 260 Ill. 516, citing Nitchell v. King, 187 id. 542; Domitski v. Merican

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Linseed Co., 221 id. 161. The proceeding under section II of the Runicipal Court Act, which is of the same character, was discussed in Loyle v. Fallows, 207 Ill. App. 5, and was declared to be a new swit, thereby making applicable the rule catablished with reference to proceedings under section 89 of the Fractice Act. This rule was recognized in Gulley v. Rathis, 195 Ill. App. 170. Under these authorities the order vacating the judgment in the case at bar must be held to be appealable.

The order in question was entered without notice to appelles, whose appearance was on file at the time. The allegations of the petition to vacate are not denied. The affidavit of defense and a claim of set-off were prepared and executed by defendant in apt time to permit their filing on april 2, 1921, as required by the prior order of the court. The failure to file them was due to a mistake which must be regarded as excusable under the existing circumstances. It was not due to any direct negligence on the part of appellee or his attorneys. These facts did not appear upon the face of the record, and if they had been brought to the attention of the court at the time the judgment by default was entered, unquestionably the court would have allowed the offidavit of defense and the claim of act-off to be filed. The failure to file them being due to mistake and these dowments showing on the face a good and meritorious defense to the ection, we are of the opinion that there should be a trial on the merits and that the discretion of the sourt in vecting the judgment was properly exercised.

The order of the Municipal Court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

or no lien recover to before one well-room of the contract amilion be discountly our phalms for any amount of galating our ha with a class of retained trep to the retained to the real and the the Lord on party of the contract on the contract of the contract of Author of the micro. The delicate to Dibe there has the printed and printed attributes of forward and the stable admitted a Print all the taken for a page of a contract the supplementation and the many of AND THAT SHOULD HER WITCHESTED SHOULD ARREST OF THE SHOULD BE SHOULD BE farm of the county and if they but build one obtains the chronitian of the season in the time to judgment of the reason of the presented to a provide the consists owner three presented with the second AND THE PERSON OF THE PERSON O real a spail of perceived through the contract of rate fruit set the not in our requires only of substitutes made appraised but ใส และเสมรองเมื่อเป็น สาทำ จัดเกรเสริบเคาะเราะ และมาตัวป แกร้ายสำหรับ กุษณณี ibi imana gironton se nammest, e casi e m mi iman sett

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COMBINSKY BROS. COMPARY.

Appellent.

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MULLEN BROS. PAPER COMPANY,

Appellee.

APPRAX FROM
BUJICAPAL COURT
OF CHICAGO.

MR. JUSTICE BORRILL DELIVERED THE CETHION OF THE COURT.

This is an appeal from an order of the Municipal Court of Chicago, entered June 30, 1921, vacating a judgment for 19.665.46, entered by said sourt April 4, 1921, in favor of plaintiff. The judgment was by default on account of defendant's failure to file an affidevit of defense within the time limited by the court.

Appellant contends that the petition to vacate the judgment and the affidevit in support thereof did not show a meritorious defense and did not set forth facts and circumstances sufficient to justify the court in vacating the judgment, and that section 31 of the Nunicipal Court Act authorizes the court to set aside a judgment more than thirty days after its entry only upon such a showing as would sustain a bill in equity for that purpose.

Section 91 of the Fractice Act permits appeals only from final judgments, orders and decrees. The courts of this state have held uniformly that this etatutory provision permits an appeal in these cases only where the judgment, decree or owier from which the appeal is taken terminates the litigation between the parties upon the morits of the case. Seenthal v. Beard of Education, 250 Ill. 29; 2.4 S. J. Ly. Co. v. Lity. 148 id. 153; Lewis v. Bew Munic Hall Co., 100 Ill. 499. 415. Applying this rule to the case at bor, it follows that the

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order vacating the judgment from which this appeal is prosecuted is not final and appealable. The judgment was set saids merely for the purpose of allowing the moving party to interpose a defense. The order vacating the judgment was interlocutory only. City of Fark Fidgs v. Murphy, 200 Ill. 365; Gramer v. Illinois Commercial New's Asso., 260 id. 516; Balley v. Conrad. 271 id. 294.

The order in question was not a proper subject of appeal, and therefore the appeal must be dismissed.

APPRAL DISHISSED.

Gridley, F. J., and Barnes, J., concur.

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IN RE ESTATE OF TRADTUS A. BARNEL. De ce ased .

ON APPEAL OF HINRY W. MAGNE.

Appellant.

VE

MARIA P. BARNES et

Appellees.

APPEAL PROM

CIRCUIT COURT.

SOOK COUNTY.

225 I.A. 6453

MN. JUNTION MORRILL MALLY MAND THE OFINION OF THE COURT.

This is an appeal from an order of the Circuit Court of Cook County affirming an order of the Probate Court of Cook County granting leave to the administratrix of soid estate to make a settlement with Maria F. Bornes of all matters in litigation between them. It has been consolidated for hearing with case general musher 27332, in which an opinion has been this day filed. The latter case was no appeal from a decree of the Circuit Court disposing of an intervening petition filed by the appollant herein in case number 295367 in said Cirauit Court. The present appeal involves precisely the same questions as those which have been considered in our opinion in case number 27352. To therefore does it unnecessary to give any further expression of our views upon the matters invelved in this appeal, which are identical with those presented in case mumber 37332.

> The judgment of the Circuit Court is affirmed. AFFIRMND.

Gridley, F. J., and Barnes, J., concur.

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April,
in the year of our Lord one thousand nine hundred and
twenty-two, within and for the Second District of the State
of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. DORRANCE DIBELL, Justice.

JUSTUS L. JOHNSON, Clerk.

CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on
the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:



Lester Fay, by his next friend, etc.,

appellee,

vs.

Rockford City Traction Company,

appellant.

DIBELL, P. J.

On July 26. 1918. Lester Fay, then three years, seven months and twenty days old, was knocked down and run over by a street car operated by the Rockford City Traction Company, and was very seriously injured. He brought this suit against the traction company to recover damages for said injuries, and filed a declaration. The first count charged that defendant negligently ran said car along the street where the accident happened at a high and excessive speed and ran it against plaintiff, by means of which he was injured. The second count charged that defendant, by its servants, negligently failed to keep the proper lockout, as a result of which plaintiff was thrown down and under the car and injured. The third count charged defendant with a negligent operation of said car on said street, as the result of which plaintiff was struck with great force and thrown down and hurt. Defendant filed the general issue. There was a jury trial. Plaintiff had a verdict for \$5.500. A motion by defendant for a new trial was denied. Plaintiff had judgment. Defendant appeals.

The main injuries were as follows. Both feet were crushed, and the right foot so seriously that it was amputated and afterwards a second amputation became necessary. The front and back of his body were very badly bruised, as were his face and his scalp. Much surgical care of the scalp and of the left foot was required. It is not claimed the damages are excessive. Because of his extreme youth he could not be guilty of contributory negligence. His mother was a tidow, doing domestic work for a family a few doors

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away from the place of the injury, and there was some evidence on the question whether she was negligent in permitting the child to get upon the street; but because the suit is brought by him, her negligence would not be a defense, and also, there was no proof which would charge her with negligence. The sole contention of defendant on this appeal is that the court at the close of plaintiffs evidence and again at the close of all the evidence, should have instructed the jury to find the defendant not guilty, whereas the court refused to give such instructions. The sole question therefore is whether the jury were warranted in finding defendant guilty.

Fourteenth Avenue in the city of Rockford extends east and west. Seventh Street extends north and south and crosses Fourteenth Avenue. Appellant operates a single track street car line on 7th Street. At the crossing of said two streets there is at the south east corner a shoe store, at the south west corner a candy store, and at the northwest corner a grocery. Mrs. Fay lived with and did domestic work for a family named Church in a flat a short distance east of the shoe store. Back of the shoe store and the candy store was an alley. The street car in question was approaching Fourteenth Avenue, coming from the south. By the rules governing its motorman he was required to make a safety stop at Fourteenth Avenue, which meant that he should either stop his car entirely at the south line of Fourteenth Avenue or that he should have his speed so reduced and his car so under control that he could stop at the south line of Fourteenth Avenue if the safety of others required it. As this car came over the alley and towards Fourteenth Avenue the little boy started from the sidewalk some where north of the alley book of the shoe store and ran diagonally in a north west direction. Apparently he was going to the candy store where he seems to have been once before that morning. He went under the car and there received those injuries. Appellant contends that the boy was not in front of the car but went under

question whether the was negligant in parabiling the child to upon the orrest; but lessues the order to have a few order to have the order to his, her eghingence would not be a defende, and chao, there were a read of the would charge her with negliganes. The sold content to order to one of sold the sold of the chart of the chart of the chart of the chart of the fary to the disease of the the orderes, short they are forty to that the terms of the cold the fary to the herestone as the cold the fary to the transfers. The cold the fary were such as the cold the fary were such that the cold the fary were rearrested in the cold that there.

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the side of the car, and therefore the motorman was not in duty bound to see and protect him. This is largely based on the evidence of Mrs. Ellen Swanson, a witness for appellee. Mrs. Swanson could not speak English, did not know the points of the compass, could not measure distances in feet but only in metres, the meaning of which was not explained to the jury by any witness. Her evidence was vague and indefinite. Appellant claims that she was the only eye witness, and that the meaning of her testimony is that the boy went under the side of the car back of the front truck. The jury were warranted in finding that she was not the only eye witness. Harold Lundeen, a witness for plaintiff, was at the grocery and saw the boy in front of the street car just crossing the track about 30 feet south of the south line of Fourteenth Avenue, and saw the street carbit the boy and knock him down and that he went under the front trucks. C. E. Church, a member of the family where Mrs. Fay worked, a locomotive engineer by occupation, reached the scene of the accident a few minutes after it occured. He was a witness for appellee in chief and in rebuttal. He found blood stains about 35 feet south of Fourteenth Avenue and still further south a disturbance of the surface in the center of the track, as if something had been aragged in the center of the track, and this disturbance began about six feet south of the blood stains. When the car was stopped all agree that the boy's head was on the west rail just in front of the rear trucks. The jury were warranted in finding that this disturbance of the ground was caused by the body of the boy and that the blood stains also came from him. There is no evidence that any part of the rear wheels had passed over the boy, and there is nothing to show how his foot could have been crushed and the blood stains produced if he went under the car at the side and back of the head truck. The motorman testified that he did not see the boy at all till after he had stopped the car because of sc eams by some one, probably Mrs. Swanson. He was a witness for appellant,

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and the questions put to him in chief assumed that he was stan ing as he was approaching Fourteenth Avenue. The car had a vestibule in front which was wooden part of the way up from the floor and closed glass above that. On cross examination it developed that he was not standing, but sitting on a stool. The glass began about two or two and a half feet from the floor. He testified that the boy would have had to be eight feet or more away from the front of the car before he would have seen him. There was another motorman on the rear of the car. His attention was attracted to an automobile backing out of the alley. Nobody testified whether this was on the east or west side of the street, but apparently it was on the west side, and he remembered that the head motorman sounded a gong at that alley because of that automobile backing out. The head motorran testified that the backing of the automobile helped him to remember that he sounded the gong on that account. The jury may have concluded from the testimony of these two witnesses that in fact the head motorman was looking in the direction of the automobile to the west instead of looking straight ahead as he claimed. There was much dispute as to the speed of the street car at the time it struck the boy. Several witnesses for plaintiff put it at 20 miles per hour, while several servants of defendant testified that if it had been going at that speed when the boy was struck it could not have been stopped by the time it reached Fourteenth Street, and the motormen on the car out the speed very low. Probably the speed was between these two estimates. There is probably no rule of law that fixes with precision the distance from the track over the street which such a motorman should have under observation. Whether the car was going rapidly or slowly it would seem that this motorman might justly be held bound to see this child after it left the sidewalk and before it reached this street car track, and if the motorman was driving as slowly as he claims, he could have stopped almost instantly if the

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safety of the child demanded it.

It seems to us that this case is in principle very like ferryman v. Chicago City Ry. Co., 242 Ill. 269. There a boy, slightly older than appellee, was on a street car track in the city of Chicago and was struck by the street car ad injured much as appellee was. The gripman was looking at some men engaged in an alternation on the side of the street and did not see the plaintiff till he was near the approaching car and when it was too late to stop. The judgment for the plaintiff in that case was sustained, which could not have been done if the evidence did not justify a verdict for the plaintiff. For the reasons stated in that case we are of the opinion that the jury in this case were warranted by the evidence in finding defendant negligent and that that negligence caused these injuries.

The judgment is therefore affirmed. Johas, J. dissents.

In my judgment the evidence shows that the motorman was not negligent as charged.

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STATE OF ILLINOIS, SECOND DISTRICT. SS. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 3 rd day of in the year of our Lord one thousand

nine hundred and twenty- two.

(Terk of the Imellute Court



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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and twenty-two, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. DORRANCE DIBELL, Justice.

JUSTUS L. JOHNSON, Clerk.

CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on
the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

William B. Elliott, Coroner, etc., for the Use of L. M. Hines, et. all appellee,

Appeal from Peoria.

Vq.

Anna Smith, et al.

appellants.

DIBELL, P. J.

This is an appeal from a judgment of the circuit court of Pecria County, in favor of appelles and against appellante in an action of debt on a replevin bond given by the appellant, Anna Smith, as principal and by the other appellants as sureties.

The appellant, Anna Smith, at the time of the transactions in question was a widow of the age of seventy .five years. For a considerable length of time she had transacted little or no business. According to her own testimony, all of her business was transacted by her daughter, May, hereinafter mentioned. All of her banking business was done by her said daughter under a power of attorney which was despoited with the Bank. She was the owner of certain farm property. She also owned a home in Peoria. At the rear of the premises on which this home was situated there was located a large garage, / With Anna Smith there lived her two children, GeorgeJ. and May M. Smith. For a time the children conducted a public garage in the said building in the rear of the premises owned by their mother. They were agents and distributors for the Westcott Motor Car Company of Springfield, Ohio, and as such bought and sold Westcott cars. The business of the garage and agency was carried on under the name of "Westcott Garage."

The business of the firm was not successful.

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the appearant, Acts Stite, as principal and by the after

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The business of the fire was not successful. On

December 30, 1919, Patrick J. Fitzpatrick recovered a judgme. against the co-partners in the sum of \$2,500.00 on which judgment, an execution was thereafter issued and levied by Lewis M. Hinse, as Sheriff, on a seven passenger Vestcott touring car as the property of the said George J. Smith and May M. Smith. This levy was made on May 20, 1920. On the next day, Ann-Smith instituted proceedings in replevin for the recovery of said car and the above mentioned replevin bond was therein executed. The property was replevined and delivered to her. The sheriff filed appropriate pleas in the action of replevin. The suit was not prosecuted but was dismissed on motion of the defendant and a writ of returns habends was issued. The writ was duly served on appellant who refused to deliver the car in question and hence this suit upon the bond.

filed a plea of the general issue and also two special pleas wherein they admitted the suing out of the mrit of replevin, the execution of the replevin bond, the dismissal of the replevin suit, the judgment for the return of the property and that the same was not returned. The special pleas aver that the merits of the case were not determined in said replevin suit and in consequence thereof, no greater damages can be recovered than one cent, because the automobile in question was at the time of the levy under the execution and at all times thereafter the property of Anna Smith and not the property of the said George J. Smith and May M. Smith. Replications were filed thereto.

The controlling question of fact is whether or not the automobile was the property of Anna Smith. According to the testimony of George J. Smith and May M. Smith, the business and property of the Westcott Garage were transferred to their mother, Anna Smith, between the 17th and 19th of December, 1919,

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only a day or so prior to the date of the judgment against the in favor of Fitzpatrick. No bill of sale was executed and the record discloses no apparent change in ownership. The son, George, continued to run the business. The testimony of May M. Smith and also of R. J. Belsley and John Denzler, cashier and assistant cashier respectively of the Home Savings and State Bank of Peoria, in which the banking business of both Anna Smith and May Smith was done, does not disclose that any deposits were made to the credit of Anna Smith because of the garage business nor that any sums were drawn against the account of Anna Smith because of such business, unless it be the sum of \$3,400.00 which was used for the purchase of the car in question and also another car at the same time.

It is fairly inferable from the evidence that at the time of the purchase of the said two cars neigher of the partners had the money with which to buy them. George admitted that he was "broke." There were at least two certificates of deposit issued by the above mentioned bank in the name of May M. Smith but she testified that these certificates were the property of her mother and represented funds belonging to her mother.

On April 14, 1920, George J. Smith was in Springfield, Ohio, in person and purchased from the Westcott Motor Car Company the above mentioned cars. The one over which the controversy arises in this case, was specially equipped with wire wheels and cost at the factory \$2,381.14. An order was given for the car on the usual form of the Motor Company, disclosing that the sale was made to the Westcott Garage. It was signed by the Said George J. Smith. In payment of these two cars George J. Smith gave to the Westcott Motor Car Company, a Cashier's check payable to its order for \$3,400.00, two

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On April 14, 1020, George J. init have in Cyriogileld, Onio, in person and vurnicused from the "nament of the Cartonia of Campary 'bu above wenticred oute. The employer which the acciding a price in this case, were enactally aquive at the cast time wire threele and cost at the factory 'S, Fills. As arise many if you the factor of the Ester Courte, its given for the oute on the count for the Ester Courte, its closing that the Courte Courte, its closing that the Courte J. Ruith. The cryvent of the courte of the court

cashier's check gayable to the order for (3, 160.00, the

other checks for \$1,137 and \$44 respectively, and also fifteen cents in money, making a total of \$4,581.15. We are unable to tell from an examination of the abstract or from the record itself who was the drawer of the two smaller checks, which checks do not appear to have been offered in svidence. However, both George J. Smith and May Smith testified that all of the money paid for the cars was the money of Anna Smith. The seven passenger car was driven from the factory to Pecria and placed in the Westcott Garage by George J. Smith. It was used very little thereafter up to the time it was levied on under the execution. One witness testified the car had been shown to him by George J. Smith who offered to sell it. This Smith denied. The licese for the car was obtained under the name of the Westcott Garage. After the automobile was replevined, Anna Smith obtained insurance on the car in her name and a short time thereafter she shipped it to California where she also went. The car was there used by her and a California license in her name was procured by her. She has since returned to Peoria and continued to claim and exercise acts of ownership over the car.

The jury under proper instructions of the court found a verdict in favor of the plaintiff in the sum of \$3,887.10 which was within the limit of the proof of damages on account of the failure of the appellant to return the car, attorneys fees incurred in the replevin suit and costs.

We have little doubt that the money used for the payment of the car in question was obtained from the appellant,
Anna Smith, but the fact that the money was here is not decisive
of the issues in this case. Under the issues as they were joined,
the burden was upon her to establish her claim of ownership
of the car. Shewas a witness in the case and at no time
during her examination did she made any claim of ownership.

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She was not asked by counsel any question concerning matters which would really shed any light upon this subject. She volunteered the testimony that she furnished the money and could do it again. The evidence does not show that she ever exercised any act of ownership over the car until after it had been replevined by her. Whether or not the car was in fact the property of Anna Smith was a question of fact for the jury. Under all the circumstances we can not see that the jury's determination of such fact was against the manifest weight of the evidence and we, therefore, ought not to disturb the verdict. We have examined all of the instructions complained of by appellants and conclude that none of them is subject to the objections urged. Fach of them stated the law correctly as it should be applied to the facts in this case. The judgment of the circuit court is, therefore, affirmed.

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STATE OF ILLINOIS, second District. second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I he eunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _______ day of ______ in the year of our Lord one thousand nine hundred and twenty-two _______ Lohnson ______ Clerk of the Appellate Court.



6981

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and twenty-two, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

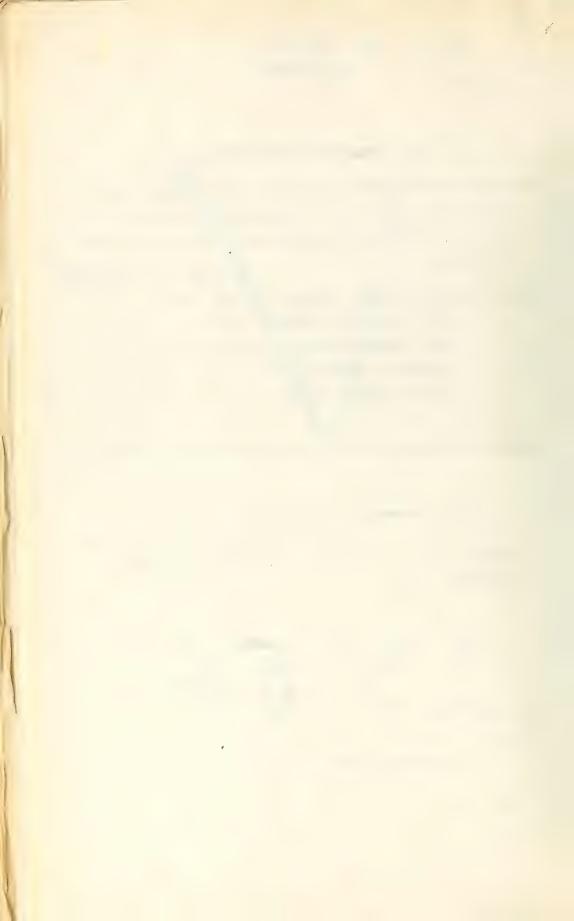
Hon. DORRANCE DIBELL, Justice.

JUSTUS L. JOHNSON, Clerk.

CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on
the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:





6987 No.49.

John T. Gardner, appellee,

vs.

James C. Davis, Director General,

and Agent of the United States,

appellant.

DIBELL, P. J.

about 9.15 P. M. of August 25, 1918, John T. Gardner, on alighting from a passenger train to close a switch, fell into a deep hole beside the switch and was injured. He brought suit against Walker D. Hines, Director General of Railroads, and the Chicago, Milwaukee & St. Paul Railroad Company, to recover damages for said injuries and filed an appropriate declaration. Both defendants filed the general issue and the railroad company also filed a special plea that it was not operating the railroad at the time of the injury. There was a jury trial and a verdict for plaintiff for \$2,000. A motion for a new trial by the defendants was denied and plaintiff had judgment against both defendants. Afterwards by stipulation said judgment was so amended that it was only against James C. Davis, Director General and Agent of the United States, and that the railroad company had a judgment in its favor. The Director General and Agent appeals.

It is argued by appellant that at the time of the injury appellee was not acting as an employee but as a mere volunteer, and apparently also that while he was acting as a volunteer he was not in interstate commerce, and therefore this suit, which is under the Federal Employer's Liability Act, cannot be maintained. Appellee was baggage master, express agent and mail agent on a local train, which seems to have started in Wisconsin each morning, been in Rockford, Illinois, in the middle of the forenoon and again in the middle of the afternoon, and in Wisconsin again at night. The train stayed

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John T. Gardner, ospailse,

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James C. davis, sirrober Con wil, and igent of the Walke without

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.bout 9.35 L. L. of August 16, 1932, John T. Caramer, on alighting from a measurer brit to chois a matech, field sampere of the explaint of the Serian pay thinge food good a othi suit agains he harmed notoarid, world of applied temisge time and the Chicago, Milwenker b Mt. Augl Asthroad Con Apr. To ornicoangs as belit mer sais toi biza tol segumen tevocet declaration. Both defoundable the common the declaration francia di sadd e. To Islamia de elli colo quegado fisotilion oppositing the rellected at the time of the infine, file of the jellos .000,83 tou Thirabele toh (phiner s inc faint yung . i bichicle has being bone commination edd . d feint asm e 101 seld jadgment was so ementer that is you only in the B. is V. Divid, Director Gen cul and Least of the Whiteh Low com, and that the relieved commany had a judgment in the force. Director desail bat few men notcente

It is argued by appellant that with the circ of the sine of the injury appelles as and setting as an areasons, and experienced the control of the control of

one night in Beloit, Wisconsin, and the next night in Jamesville, Wisconsin. Appellee had been at work on the railroad in the capacity mentioned for six or eight months. When they reached Beloit every other evening the train was headed north, and was put away on a sidetrack some distance south, and it became necessary to pass through at least two switches to reach the point where the train was left. The conductor left the train at the depot, and the rest of the train men put the train away. The brakeman rode on the advancing end as the train backed up, and got off at the first switch and opened it and walked to the second switch and opened it. The baggage master got off at the first switch and closed it after the train had passed by, and then went to the second switch and closed it in like manner. No officer of the road ordered appellee to do this work. No printed rule required that duty of him. He testified that when he first took that position the brakeman told him that he must close the switches after the train as it was put away. It is contended that the brakeman had no authority to give him that order. Appellee also proved by a witness who had been a conductor on that train for several years and who had known of that practice for ten or twelve years, that ever since he had known of the train stopping at Beloit every other night, the baggage master had gone with the train to its resting place at night and had closed the switches. From that long continued practice we think the fair presumption is that this was a duty which rested upon the baggage master, notwithstanding no express printed or written order could be found for it. We three fore hold that the jury was warranted in finding that he was engaged in the performance of his regular duties in closing those switches, and therefore that he was engaged in inter state commerce while putting away the train.

Section 4 of the Federal Employer's Libbility Act

one might in Beloit, Wisconsin, and the same of thi is Jamesville, wisconsin. Aspolles had been we noth on the tellread in the constity mentioned for the or while worth. . . i.e. Seasel e . . . it if it calabre reads where field bedeser went north, and was set amon for a siderable sone city and sem ben directly. it became meconary to pear throw it no sear two sullaines to reach the moint where the train was lift. The commence is in the train at the darch, and the rest off the train and the train away. The breween rode on the narranging and sa the tirt becide up, and got off at the first spiceh and across it is walled to the second switch and open d it. The begreen secuen got off et the first switch and cleana it after the first but passed by, and then west to the second switch and cheen it in like mannam. He caficer of the mena catered careff of the this work. No printed appointed that dury of him. testified the solution feat foot test of medy test bettitest the angular and no how acceptance wit proces from en soul oute blot on him awardend whit head that the brekers and an enthority to give him that cream. Appelled will original ward Herryan for altery file no appointed a peak & i sin esentiw years and the hed known on that brackles for ten or trains years, that ever since he had been and the town and the Belott every other utaht, the baggage neater hat some with the toll from rescions at how inhing to coast minters with of minters is these this were a company middle meason toom the hopens measter. nothing and ing one one of the or writing or order of the to found for it. . . s surprise hour that the farm and recent if the content that he gas ent of this calbuff of regular author in closicy than a dicket, of ther fore that ne was engaged in this trule contract chile surthing to the

of 1908 provides: "such employee shall not be held to have assumed the risks of his employment in any case where the vi lation by such common carrier of any statute enacted for the safety of employees contributed to the death or injury of such employee." This injury did not arise in that way, and therefor the assumption of risk by the employee is as it would have been without that statute. Appellee assumed the risk if he knew of the defect and appreciated the danger and continued in the employment without objection. The railroad company had a "safety First" card, blanks of which were kept in convenient places, and employes who discovered anything dangerous were required to fill in one of these cards and describe the place of danger and send it to the superintendent. About ten or fifteen days before this accident appellee, when closing this switch in the night time, discovered a hole and filled out a "safety first" card. on which he said: "There is a hole at the switch bythe bridge at the round house in South Beloit, where we put our train up." He signed it: "Baggageman 301," 301 being appellee's train number. He put this in an envelope and sent it to Beloit. Wisconsin, addressed to the superintendent. The superintendent never communicated with appellee about this, and he did not repair the defect. Appellee only saw this hole at 9.15 P.M., by the light of his lantern. The jury was warranted in finding from the evidence that he did not know the depth of the hole. He had a right to expect that the defect would be promptly repaired. As he made complaint in the manner provided by the railroad company, we are of the opinion that the jury was warranted in finding that he did not assume the risk under the circumstances in proof, ten or fifteen days after his complaint, and after a reasonable time in which to repair.

The second instruction given for appellee left it to the jury to determine whether plaintiff assumed the risk, but did not define assumption of risk. That was properly a matter

of 1908 provides: "auch condryor shall not be held to h ve assumed the ricks of his employment is the east of because lation by such councer carrier of my switch emobs, for the safety of employees contributed to the de in et injury of sich suployee. This inferry win was action to the confidence in the call most cych almost the bull exploses show the lair to nother meet and -to telt mi an unitare has themai and bet topyage but tooked edt g a without objection. The collread correspond to First card, blanks of which were kept in consections of the F. and employed who discovered out their desired as against to the case of there eards and describe the place of the anomal and process of the second contract of the second this accident appellee, when cleares this action in the make A CONTRACT OF THE CONTRACT OF on which he said: "There is a hall at the saide by as bringe control of the contro He signed it: "Laggagemen 401," Son seins socilee's triin number. We gut this in an envelope and sent it to beloit, tarons and address of the unusationed and at Seasonia, abunesati never communicated with a possible about this, and he did not repair the dorse to sint was gine entireys. . . tooked ent thegor in the light of his lantern. The fary was earned a to the the from the evidence the the did not know the dament of the mole. ATTURNED BY I THE THE REAL PROPERTY AND AND ADDRESS OF ANY ARE DO DO CLETCH WHILE HE AT A THE STREET WHILE A SALE AND ADDRESS. reilroad company, we are of the epinion that the juny and ent sellow take and casua, for the ed to de spilledt mi betweener and the second of the second o

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of defense to have been defined by instructions requested by defendant. (Moore v. Wabash R. R. Co., 299, Ill. 596, on p. 605.) Appellant showed that it appreciated this by its third and fourth refused instructions, but each of these instructions was defective. The third left it to the jury to say whether appellee "reasonably should have known of the possible hazard," and the fourth left it to the jury to say whether appellee "should have known of the possible hazard." It did not tell the jury under what conditions appellee should have known of the possible hazard, in order to defeat his recovery. Perhaps the jury would have understood it to mean "by the exercise of reasonable care," or they might have understood that the jury were at liberty to determine, for any reason which they chose, that appellee should have known of the hazard. These instructions were properly refused. We are of the opinion that the fifth instruction, given for appellee, was not erroneous. It was based on the Federal Act.

It is contended that the damages are excessive. It is true that a physician who attended appellee in behalf of the express company, for which appellee also worked, gave evidence tending to minimize the injury, but when we consider the testimony of appellee and of two other physicians and the testimony concerning X-ray pictures and what they demonstrated as to his physical condition, we conclude the damages cannot be demonstrated to be excessive and that it would serve no useful purpose to set out in this opinion all the testimony on this subject.

brief from the files. Leave was given appellant, after his oral argument, to cite additional authorities and it was not intended to permit further argument, but in view of the conclusions reached, we conclude to deny that motion.

The judgment is affirmed.

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STATE OF ILLINOIS, SECOND DISTRICT.	ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
in and for said Second District	of the State of Illinois, and keeper of the Records and Seal thereof,
do hereby certify that the fore	going is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of rec	ord in my office.
I	n Testimony Whereof, I hereunto set my hand and affix the seal of
	said Appellate Court, at Ottawa, thisday of
	in the year of our Lord one thousand
	nine hundred and twenty-



6989 123 /411

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and twenty-two, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. DORRANCE DIBELL, Justice.

JUSTUS L. JOHNSON, Clerk.

CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on
the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:



Arthur McKeown,

Defendant in error,

vs. Er

Mart Murray,

Paaintiff in error,

Error to Henderson.

Dibell, P.J.

This is a suit in assumpsit by Arthur McKeown against Mart Murray, brought to recover \$2,500. alleged to have been paid under moral duress, and interest thereon and a small sum for rent. McKeown filed a declaration containing a special count and an amended special count concerning the \$2,500. and a special count for rent and a count for money had and received and the consolidated common counts, to which defendant pleaded non assumpsit except as to \$78. rent, tender of said \$78. and set-off. Issue was joined on these pleas. It is not necessary to state the details of the pleadings as to the rent or the set-off or the tender, since no question is here raised, concerning them. It is not necessary to set out the amended and special count for money paid under moral duress, nor is it material whether the details are proved as laid therein for recovery can be had for money obtained under moral duress under the common counts and count for money had and received. Bradford v. City of Chicago, 85 Ill. 349; Pemberton v. Williams, 87 Ill. 105. There was a jury trial and a verdict for plaintiff for \$2,831.94. A motion by defendant for a new trial was denied and plaintiff had judgment. This is a writ of error sued out by defendant to review the record.

The right to recover money paid under moral duress is considered and many authorities upon which the rule rests are cited and discussed in County of La Salle v. Simmons, 5 Gilm. 513, and in Bradford v. City of Chicago, supra, and Pemberton v.

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Defendant in error,

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Dibell, P.J.

This is a cuit in as mugait by ittium MoMesons arainst Mart Murray, brought to recover '3,500, allered to tays been mor Iface white mostelf treater that the search faton tohan bing for rent. Modesum filed a declaration containing a secolal. count and an emended special count conserning the (2,000. And beviseer has bed yours rol imuse a kine fuer not imuse lakees a and The Gongolialied domnon country, to which Aslendant when Asl non assumpsit except as to \$78. rent, tender of said \$78. and set-off. Isaus was joined on these plean. It is not necessary to state of the details of the plendings as to the gent or the set-off or the tender, since no question is here raised, onosming them. It is not necessary to set the amediad and special countrior money paid under coral fursos, nor is it roll nierent lital as hoverg one aliatob edt redtedy labretam recovery orm he had nor money contained under morel duress un.er the common counts and count for mersy had and reserved. Traifort v. City of Chicago, SE Jil. 318; Pesberten v. Willians, 27 111. 105. There was a jury trial and a verdict for plaintiff for \$8,831.94. A mebion by defendant for a new trial mas Juned and plaintiff hid julgment. This is a writ of erver seed out by defendant to review the record.

The right to recover woney hald under moral durers is conaldered and many authorities upon with the rule rests are offed and discussed in County of ha Ealis v. Simmons, 5 Gilm. 515, and in Fradicri v. City of Caloago, surrs, and Philarton v. Williams, supra. Two recent cases on the subject are City if Chicago v. N. W. Mut. Life Ins. Co., 318 Ill, 40, and Cook County v. Fairbank, 333 Ill. 578. In the former of said two cases last cited, on p. 44, the court said: "It is the well settled rule of this State that where one is compelled to make payment of money which the party demanding has no legal right to receive, in order to prevent injury to his person, businessor property, such payment is, in law, made under duress and may be recovered from the party receiving it; and it makes no difference that the payment was made with full knowledge of all the facts, provided it was made under duress." There are other cases where the right to recover has been denied under the facts of the particular case, but we think it unnecessary to cite them, because in our view the language above quoted applies to the facts in this case as established by the preponderance of the evidence.

There is a conflict in the evidence on various points but we conclude that the jury were warranted in finding the following to be the material facts. For several years and up to February, 1919, R. W. Bolton, formerly of this State but then living at Pittsburg, Pennsylvania, owned 160 acres of land in Henderson County, Illinois, and Mart Murray was in possession as his tenant. Arthur McKeown, then in ill health, through his wife who acted as his agent, desired to purchase said farm. McKeown and his wife visited Murray on the farm in February, 1919, told him McKeown was considering the purchase of the farm, and asked what his interest was. He told them that he had one more year, and that his term expired March 1, 1920. Thereafter before the end of February McKeown bought the farm of Bolton and obtained a deed therefor which contained the provision that it was subject to the rights of

Williams, supra. Two recest cases on the subject are City if Oliogra v. M. W. Lut. Life Inc. Co., 318 Ill, 40, and Cook County v. Fair ank, 222 111. 572. In the former of said two ocess last cited, on p. 44, the court said: "It is the of beilegnos si one event with state sint le sint belties Llew make payment of money stiple the party demanding tor no legal right to receive, in order to prevent injury to the person. businessor property, such payment is, in law, made under dureec and may be recovered from the porty receiving 11; and it. makes no diffence that the payment was nade with full knowledge of all the facts, provided it was made under intres." There are other cases there ear sight to recover had been denied under the facts of the particular save, out we total it unbecessory to dite them, because in our rice the language beisifding as sees shit it itself of applies on the beisifdings by by the preponderance of the evidence.

There is a conflict in the swilence on various points but we conclude that the jury were warrented in Finling the following to be the meterial facts. For several years and up to February, 1919, R. W. Wolton, forseriv of this State but them living at Pittaburg, Pennsylvania, owned 186 acres of land in Henderson County, Illinota, and Wart Murray was in possession se his tenent. Arthur Moscown, them in ill health, through his wife who goted as his agent, desired to purchase through his wife who goted as his agent, desired to purchase in February, 1819, told him Moscown was considering the purchase of the farm, and aided what his interest was. He hard them that he farm, and aided what his interest was. He karch 1, 1820. Thereafter before the end of February Moscown bought the farm of Polton and obtained a deed therefor which bought the farm of Polton and obtained a deed therefor which contained the provision that it was subject to the rights of

the tenant in possession. On June 21, 1919, McKeown entered into a contract to sell and convey said premises to Harry E. Miller at an advanced price, and agreed to deliver posse sion on March 1, 1920, and KcKeown received part of the purchase price. In the latter part of July, 1919, Miller entered into a contract to sell the farm to one Moffitt for an advance in price and to deliver possession on March k, 1920. In the latter part of August, 1919, Murray notified Miller that he had a five year extension of the lease and would not deliver possession on March 1, 1930. Miller brought this information to the attention of Moffitt and they consulted lawyers, and afterwards McKeown was advised that unless he delivered possession on March 1, 1930, Moffitt would sue him for damages and claim \$8,000, and Miller would sue him for damages and claim a like amount. On September 2, 1919, McKeown and wife, Murray, Miller and Moffitt met at a bank in Stronghurst in said county, Murray remained in one room and McKeown and wife in another, and Widmer, the banker, and Miller went from one room to the other trying to bring about some adjustment which would cause the tenant to vacate the premises on March 1, 1930, and enable Moffitt to take possession. On August 29, 1919, Murray had filed for record in the office of the recorder of deeds for that county his original lease and an endorsement thereon, dated September 14, 1918, and signed by Bolton and Murray, extending Murray's lease from Bolton for five years from September 14, 1918. It also was a fact that in the original lease between Bolton and Murray was the following provision: "This contract drawn for five years but either party may cancel the contract prior to the 15th of August of any year by paying the other party one hundred dollars (\$100.00) cash, same to take effect

the tenant in porsession. On June 21, 1819, Malloom sarened into a contract to sell and coarsy caid presides to Reary B. Miller at un adv. noed price, and agreed to deliver posse chen on March 1, 1020, and Moderwa received part of the purramosprice. In the Latter part of July, 1815, Miller entered into ni toperis na rol stiffed one or arul sat lies or deprines s price and to isliver possession on darch &, 1820. In the latter part of August, 1910, Nursey notified Hiller that le toulist on hisew bas seasi ed. lo moinneixe prey, evit a bad posacasion on March 1, 1981. Miller brought this indurenton Land , easy and is derived year land taillow to moitant to eit of firstich ed aceins took kestvas sam moe MoM abuumetla possession on March 1, 1880, Mediits would see his don rot wit gur, bluck relikt that (000, 30 min policy compression for business and states a Line of the property of the property of the property of Modeova and wife, Murray, Willor and Folfitt met at a hank in Stronghurer in said country Paramy remained in one room and Modeown and wife in ancider, and Wilmer, the canker, and Avoid ; mind of prigra tendo ond of moor and mora train; about end stable of finalist sit cause blugg loter insulorithe smoe premises on March 1, 1930, and enable Northth to take persectation. On August St. 1814, Marray had liled for coord in the office of the resonance of insua low that somely its original Letar and an endersement thereof, Auto trigite ter 14, 1818, and eigned by Moleco and Justay, exsending "corxy" c leans from Lodron for live years from Reptonser 14, 1813. It also was a lest test in the cripical leads bor ter Relton and Jureay use the folicil, providion: "This const of dram: for five years, the ability party, may canced the controls prior to the iften of dayses of any gener cy paying the other party our hundren dollars (\$100.00) sach, some to take enfect

March 1st of the following year." At the meeting in the bank Murray insisted that he would remain in possession. It seems to have been assumed by Murray that under that or vision unless he was paid \$100 before August 15, 1919, he could remain in possession under the lease for another year after March 1, 1920. We think this not the true construction of the clause above quoted. We are of the opinion that it was not the meaning of that provision that if Bolton did not pay Murray \$100 before August 15, 1919, that Murray could hold still another year; that the quoted clause was meant to apply to a desire to end the lease before it would terminate by its terms, but that the provision quoted could not be availed of to extend the lease beyond March 1, 1920. It is also to be observed that it is dated September 14, 1914, and is for five years and does not anywhere say in terms that the lease is to begin or end on March first, but as it is a lease of a farm and the parties have interpreted it as running to March first, and as such leases usually begin at that time, we think the lease should be treated as the parties intended it as beginning on March first. Moffitt told Miller and Widmer that he demanded \$3,500 damages and that he would not vacate the premises unless that was paid. This was conveyed to McKeown and wife. McKeown declared that he had a right to the possession on March 1, 1920, under the circumstances stated, and refused to pay any damages whatever. The fact that Moffitt and Miller, respectively, intended to hold McKoewn liable for damages unless possession was given on March 1, 1920, was well known to Murray and was communicated to McKeown and wife. After much discussion and controversy, McKeown said: "This has got to stop; it is killing me." He was very sick at the time. His wife then assented and McKeown and wife gave their note for \$2,500 payable to Murray and

March let of the following year." At the accinn in the bank Murray inciseed that be would remain to yourselien. It goese sesion noisiv to their asima and thereis ased over of he was paid \$100 pafore Aurust 15, 1918,, he could remain in possession under the large for another your after force 1, 1826. To think this not the true construction of the plane above questa. We ame of the crimical that it has not the Action of that provision that if Bolton did not pay Murray (100 before August 15, 1919, that Murray oculd nold sydll another year; that the quoted clause was meant to apply to a desire to end the lease before it sould terminate by ite terms, but time to provision quaked sould not be artitled of to extend the lesse beyond handboll, 1880. It is talk to be done well had in is dated Replember 14, 1914, and is don fire years od does not mo has to hiped of all owned and 'add acted all yes etadwins March first, but as it is a lesse of a case and the parties have interpreted it as running to March first, and as was lowers woully begin at that time, we think one is no enough og . terti dersi no principar se ui bebroini se ituaquit as betreut Molitt told Willer and Widner out to demanded taged darage . Eine ear feet seeing sestang sit stoom for blugg of tant bar This was conveyed to Modeorn and wife. Modeors deplayed that he had a right to the possession on March 1, 1870, under the circurstances stated, and refused to pur any danders was-tar. The fact that Moffict and Miller, respectively, interior to hold MoMoren liable for damages unless possession was given on March 1, 1927, sas well known to Murkey and was our Jaiottich to MoReoun and wife. After much discussion and controversy, ell ".or potelli of the good of tog and eld?" this armode westor but Letneres and offer all .out ent to wois green and vire gave their note for (2,,000 payable to Hurray and

Murray executed an instrument agreeing to deliver possession on March 1, 1920. Murray sold the note before maturity and McKecwn paid it to the holder at maturity, as he was legally bound to do. He then brought this suit to recover the money. McKecwn had a right to rely and act upon the statement of Murray that his term ended March 1, 1929. McKecwn bought and paid for the farm in reliance on that statement and he was not liable to pay Murray anything for afterwards agreeing to deliver up possession at that time. The payment was forced from him by the wrongful assertion of such a right after he had entred into contract relation with others which necessarily would subject him to liability to heavy damages. The facts, which the jury were warranted in finding from the evidence, justified a verdict in his favor for \$2,500 and intrest thereon at five percent from the time it was paid.

It is argued that McKeown should have paid \$100. to Murray before August 15, 1919, for his own protection, and in this connection it is urged that the court erred in not admitting in evidence a letter offered by defendant, dated July 18, 1919, from Mrs. Bolton to Mrs. McKeown, in which Mrs. Bolton told Mrs. McKsown that Murray must be paid \$100. during that summer in order that he vacate the farm by the first of March following, and that Murray could stay on the farm another year unless that payment was made at the date named in the lease. As already stated, we construe the language of the lease differently from what Mrs. Bolton did in that letter. Besides, McKsown had bought and paid for the farm on the stragth of the statement made to him by Murray that his term would end March 1, 1920. without any suggestion of any such provision under which his term might be extended for another year, and McKecwn had not seen a copy of that lease until after he had bought and paid for the farm, and his rights as to the tenant could not be

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It is argued that seder a should have pall 1110. to Murray select August 15, 1919, Nor Lis our protection, and in ani tinfu fog mi farme trece and that loyme at di aci commos cint in orideros a seitar officel by defendant, dated July 18, 1818, iron don. Bolton to bra. Molocon, in which West Bolton told Mrs. Modeown bast terrer rest or paid \$100. during that surver in order that he ven to the director first of 'are' fallowing, hadd seather a ag reddoor word end no guite bluce gamed radt bas planta ch .se. pl ent it lenam stab edt to show any incuraq stand, we construe the tangenge of the lawer differently from NAME AND ADDRESS OF THE PARTY OF THE PARTY OF THE PARTY. ាត់ក្រុម ខ្លួនទី២ ១៨។ និក្ខុ ស្នាំ ្រឹងទៅ១ ១៨៤ ៣០ ឈុយនេះ ១៨៤ ៣០៥ សំណែង ៤៣០ ៩៣៣៣១៩ rade to sin by Marsey than his war tould end hard in 1811; willight any angleblica of one week products which will that had a watch that they red ther set helps to anyth hard Bird limb that of boil at angle this same that he greek a more for the day, and his rights as to the besent could not be affected by a letter by Mrs. Bolton to Mrs. McKeown in the following July and after he had sold to Miller and contracted to deliver possession on March 1, 1920. Complaint is made of the evidence of Miller and another witness about the statements Moffitt and Miller and this other witness made to McKeown that he would be sued by Moffitt and by Miller and held responsible for heavy damage if he did not deliver possession on March 1, 1920. We think it shown by the evidence that this information was carried back and forth between the room in the bank where Murray was and the room where the McKeowns were. Also, we think it was competent to show the state of mind of McKecwn when he finally promised to pay the sum Murray demanded and for which he declared himself not at all liable. But further. than that, the evidence could not harm Murray for it was obvious that McKeown would be liable to serious damages if he failed to fulfil his contract to deliver possession March 1, 1920.

It is said that the court erred in giving instructions 4, 10 and 11 for McKeown and refusing instruction 9 requested by defendant. Instruction 4 is sustained by City of Chicago v.

N. W. Mut. Life Ins. Co., supra. We approve instructions 10 and 11. No. 9, requested by Murray and refused, contained this expression: " if you find from the evidence any statements would have been made by the defendant Murray as to his rights in the land," etc. It would have been error to set the jury to speculating what statements "would have been made" by Murray, and the form of that expression is sufficient to condemn the instruction, if it contained no other vices.

We find no reversible error in the record. The judgment is the fore affirmed.

affooted by a letter by Mrs. Bolton to Mrs. Modeorn in the desparation has railing of her and and raile bas virt raivoiled to deliver possession on March 1, 1920. Complaint to make of the evidence of Miller and another withers about the statements Modfitt and Hiller and this other witness made to McKeen hist afdiancers his how wallik we have stilled yet howe and have not for heavy issays if he did not deliver posservice on March 1. 1930. We think it shows by the evidence that this information ens.'t wined wit it wood and now the form the wood bairned was Murray was and the room there the Modesons mars. Alto, as think it was competent to show the state of sind of LaMeten when he finally promined to pay the run Murray demanded and for which he declared bimesid not at all liable. Fur funther, than that, the svidence could not harm Murray for it was civique that the first an armed author of soldell and the world that fulfil his contract to desivir possession Maro 1, 1950.

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STATE OF ILLINOIS, \ ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

> In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 20th day of in the year of our Lord one thousand nine hundred and twenty-



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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April,
in the year of our Lord one thousand nine hundred and
twenty-two, within and for the Second District of the State
of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. DORRANCE DIBELL, Justice.

JUSTUS L. JOHNSON, Clerk.

CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on
the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

7005 No. 55

vs.)
City of Zion, appellant.)

DIBELL. P. J.

On November 4, 1920, F. E. Will filed a petition for a mandamus against the city of Zion in the Lake Circuit Court. The City filed an answer. While mandamus is a common law action and an answer is not an ordinary common law pleading, it is permitted by the Mandamus Act. To said answer plaintiff filed what he designates a first and a second replication, which replications fail in several respects to comply with the rules governing common law pleading. Defendant filed what it calls a rejoinder to the first replication and a rejoinder to the second replication. These rejoinders do not comply with the rules governing common law pleading. Plaintiff demurred to each of said rejoinders. Said demurrers were sustained. Plaintiff moved that a writ of mandamus issue on the pleadings. Said motion was granted and a mandamus was awarded. This is an appeal by defendant from that judgment.

Appellant contends that the court should have ruled defendant to plead further and, as it did not do so, and as defendant did not elect to stand by its rejoinders, the judgment should be reversed. Defendant did not ask leave to amend its rejoinders or to file further rejoinders. Under the decision in C. C. C. & St. L. Ry. Co., v. Bozarth, 91 Ill. App. 68, on p. 73, we conclude that the action of the court in that respect is not error of which defendant can now complain. We also conclude to ignore the apparent defects in the pleadings and to consider the matters which we think we conclusive.

The litigation related to a sewer in an alley just north of plaintiff's dwelling and to another sewer built by Wilbur Glenn Voliva in the same alley for the use of a college

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building on land owned by Voliva on the north side of said alley. Plaintiff had been connected with the sewer next to him for quite a number of years and Voliva had been connected with the sewer put in by him about a year when this suit was begun. The sewer with which plaintiff was connected will be called the old sewer and Voliva's sewer will be called the new sewer. While the petition for mandamus does not expressly say so, the other pleadings show that the old sewer was a private sewer. Plaintiff had a septic tank on his premises where he lived, which received the sewage and drainage from his home and from which tank its contents were discharged into the old sewer, with which many other people were also connected. When plaintiff installed this septic tank two officers of the city inspected it and approved it. In 1920 the city condemned the old sewer as unsanitary, etc., and directed plaintiff to disconnect his premises therefrom. At the same time Voliva asked the city council to permit him to lay a private sewer in said alley to drain the college building on his premises, and the city adopted an order giving him such permission under certain provisions, among which was a grant to Voliva of the right to permit other individuals to connect therewith upon such arrangements with other property owners as he and they might make. The prayer of the petition for mandamus was that the city be required to restore the oldsewer as it was prior to October 12, 1920, and to repair any breaks therein, and to restore the outlet of the same and to restore the connections between plaintiff's tank and said sewer as it was on October 12, 1920. The mandamus awarded in the final judgment commanded the city to connect plaintiff's tank with the new sewer, and that, if the city did not do so within ten days after demand in writing, plaintiff cause the connection to be made, and that

on less to copy agree by soling an who more ages of soig Particular been concrete with the same in the adjourned to a first existed and along to reduce a crise of and the statement of th an Cit. A tableto any landran delin Athranes add , man rein voidu pled affice enona a symble volume suppe ile e. THE RESERVE AND ADDRESS OF A STATE OF THE PARTY OF THE PA though and a war also did that the old one a paint of of evode socioest sid to that billes a see Chisalain . and the form the neutral inch parties in the neutral state of the comment of the and the second of the second o . The state of the and the second s in substant and appropriate for how out out the estate of the all of Dillouin with the cold, the local of the life Blue of ement equation on a first size disting of Atomoro with to Arylis the coulders but Time on bit prochem, now the Mistreo mara moistinger dose min raisig trabro an beigobo di close, saden this and a remain to vest me of the taken to for gorn file tell country it alambiviled tells to ស់ នៅនេះក្នុងលើ ១៤៩ ភូមិ ១ ការពេលមេខ ក្ដីខែមជ្ជការ ខេងទី១ នាំទី២០ ៩៩៣ .At .. fy our me where we'ver thoog aft to son, any off ... La voice wai si de nomedalle voit et maner et conimpan es a l'entre of ame administration is not the control and and restante the cutign of the seem out to restant the company this grains. To the state clube of both minut affect which ment

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the city permit plaintiff to make the same; and that Benjamin Thacker, city engineer of the city of North Chicago, be a referee and be vested with all the power and authority he would have had if the city was causing said new sewer to be built and paid for b special assessment and he had been appointed by the city to spread the assessment for the cost of the sewer; and that said referee should dete mine the amounts of general benefits which should have been assessed against the city and against plaintiff's lot, and that he r turn to the court a certificate of the amount that should be assessed against plaintiff's lot. There was also a judgment for costs in favor of plaintiff and against the city. It will be seen that this judgment is a wide departure from the prayer of the petition, which only related to the old sewer. To this appellee replies that he asked for that relief as to the new sewer in his second replication, and that such prayer in the second replication should be considered as a new assignment. Without considering whether it should be so treated, it related to property of Voliva and asked that the city decide upon a method of compensating Voliva for the cost of the construction of his new sewer and it is obvious that the court could have no jurisdiction, either to determine what compensation should be paid to Voliva or to order the city to connect appellee with Voliva's new sewer when Voliva was not a party to this suit. It follows that much of the judgment was necessarily without the jurisdiction of the court. We are unable to see what authority the court had to appoint a referee and to bestow upon him the authority to spread a special assessment upon any property for the cost of the new sewer constructed by Voliva a year before this suit was begun. The jud ment also does not indicate what is to be done after such an assessment has been returned to the court. It does not direct the referee to return the amount of the assessment against the city but only the amount of the assessment against plain-

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tiff's lot. It does not seek to retain any jurisdiction over the cause, and apparently the making of said assessment by the referee and its return to the court is a matter not to be further acted upon by the court. We regard it as also clear that the court had no jurisdiction to compel the city to make a commection between plaintiff's tank and Voliva's private sewer. As the old sewer was a private sewer, appellee apparently has no greater rights in the old sewer than Voliva has in his new private sewer, and each of them have no rights in the private sewer of the other. It does not appear that appellee has applied to Voliva to be connected with his new sewer or has sought to ascertain what compensation he ought to pay Voliva therefor under the order entered by the city.

Moreover, a mandamus will not be awarded unless the right thereto is clear, nor unless the party applying for it shows a clear obligation of the party against whom the writ is sought to do the thing which the petitioner seeks. It will not be awarded in a doubtful case, but only where the right of the relator is clear and the party sought to be coerced is bound to act. This is laid down in many cases cited in People v. Blair, 292 III. 139. The city had condemned the old sewer as unsanitary and defective. There is nothing in these pleadings to show that it was not justified in this condemnation. There is nothing in these pleadings to show that the city was bound to repair the old sewer and to restore it to usefulness, nor that it had any funds under its control with which to make such repairs. The pleadings show other people connected with said old sewer and interested therein, and they are not made parties. The pleadings do not show any right in appellee to use the new sewer. Taking the showing made at its best for appellee, a clear legal right to any relief in this case against the city does not appear.

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STATE OF ILLINOIS, second District. | ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.



6941

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and twenty-two, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. DORRANCE DIBELL, Justice.

JUSTUS L. JOHNSON, Clerk.

CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on
the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:



6948 No. 2.

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William Lohmar, appellee,

vs.

John Ross, et al. appellants.)
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JONES. J.

This is an action by the appellee, William Lohmar, against John Ross and Bert Nicholson, partners, doing business under the firm name of Ross & Nicholson, and the Joliet Motor Company, appellants, for fraud and deceit in selling a Ford tractor, plow and disk. It is claimed that the defendants to secure the sale of the machinery to the plaintiff, assured the plaintiff that it was new machinery and he thereupon paid \$1,055.00 for it when in fact the tractor was not new but had been used as a demonstrator. The plaintiff obtained a verdict against all of the defendants in the sum of \$800.00. Separate motions for a new trial were made by Ross and Nicholson and the Joliet Motor Company. Both were overruled and a judgment was entered on the verdict.

County, which was territory of the Joliet Motor Company for the sale of Fordson tractors. The plaintiff went to Ross & Nicholson at Coal City to buy a Fordson tractor, plow and disk. Ross & Nicholson had that vicinity as agents in Grundy County but not in Will County. Ross and Nicholson had no unsold tractor on hand and Ross called the Joliet Motor Company by telephone. He talked first with Mr. Gallagher of that company and afterwards with Mr. Barnes, the general manager. He stated to Barnes that he had a customer who wished to buy a Fordson tractor, plow and disk and asked whether the Company could fill such an order. Upon receiving a reply in the affirmative, he inquired how

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The visintiff, William Robert, lived in Will County, which was territory of the Jaliet Retor Occount for the sale of Erdeba tractor. The plaintiff want to Ross if Good Sity to Roy a Printiff want to Ross a licholson had the Talinity as agents in disk. Ross a licholson had the Talinity as agents in Grundy Counts but not in 1111 Searts. Ross and Wishelmen had no neself tractor on had antions exilt the Foliat Solds. However, that ecopons. He tolder distantiation with Mr. Samme, wellagher of that ecopony and afterwards with Mr. Darne, delicate from the forest marker. No stated to Rumas that Mr. Darne, and asked marked to hay a Porduce tractor, Now and disk and asked whether the Company could fill ancher no order.

much Ross & Nicholson would receive for making the sale. There is a dispute regarding Barnes' reply, Ross saying that he told him the usual five per cent commission, while Barnes' testimony is that he told him five per cent off or the usual five per cent. After this conversation Ross discussed the matter with the appellee who said that he would take the machinery. Thereupon Ross again called Barnes and told him that he had made a sale. The next day Ross went to Joliet to get the outfit and was informed by Barnes that the tractor was a demonstrator. The price of the tractor alone was \$780.00. Ross gave Barnes his check for \$742.60. took a receipted bill which set forth "commission \$37.40, balance due \$742.60." Later Ross got the plow and disk and took a similar receipted bill showing commission of \$13.37 given to Ross by Barnes, and the payment by Ross to Barnes of the balance of \$261.63.

The tractor, disk and plow were delivered to the appellee by Ross & Nicholson. The tractor did not prove satisfactory to the appellee and he demanded a new one instead of the old one. Ross & Nicholson made attempts to remedy the defects in the tractor as did also the Joliet Motor Company, both contending that the tractor was injured by appellee's son, who was not skilled in the operation of tractors. Subsequently this suit was filed.

The Appellee contends that Ross & Nicholson were the agents of the Joliet Motor Company; that Ross & Nicholson made false representations with respect to the tractor and that the Joliet Motor Company is liable for such representations as well as Ross & Nicholson. Ross & Nicholson also contend that they were the agents of the Joliet Motor Company and on the trial offered evidence to establish such agency. The Joliet Motor Company, however, insists that the

much Rose a Micholson would receive for anking the tale. There is a dispute regarding Barnes' reply, Rous saying that to told him the namel fire par come complesion, while Bornes' testimony is that he told him five yes cent of or -all prof noiser the said with . . thos con owil laure off Ligon of this bive of weather, of dilw wett me edt became take the machinery. Thereton Ecot og in sellet Barnen wat fold him that he had made a sale. The next day her west that because of hemselve and has thitmo ent teg of teiled of rotests and to colve call .notartamous a ses rotest adt Lone was (780.00. Rose gave Barnes his chack for Tra. 20. took a receipted bill ghich sat forth "counisaten .57.10. balance due \$WAR.50." Later Mose got the plow and aid married to be consistent and the first transfers to be a wind given to Rose by Burnes, and the pagment by Rose to Lernes .to. Idd to esmaled ent to

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transaction between it and Ross and Nicholson was a completed sale of the tractor to them and that the company is in no wise bound by any representations that they may have made to the appellee. The Company take the position that the judgment ought to be reversed as to it and affirmed as to Ross & Nicholson. Upon an examination of the record we find no reversible error in the admission or exclusion of evidence effecting the question of agency. From a thorough consideration of all the evidence we are of the opinion that the Joliet Motor Company did not sell the tractor, plow and disk to appellee, Lohmar and did not make any untruthful representations to him; and that this action cannot be maintained against the Joliet Motor Company. We are further of the opinion that the transaction between the Joliet Motor Company and Ross & Nicholson was a sale of the tractor, plow and disk to them; that they were not the subagents of the Joliet Motor Company; and that they could not create any liability against the Company by any representations they may have made. Although the profit to Ross& Nicholson is called a commission, nevertheless, the purchase price of the implements is given in statements to Ross & Nicholson who thereupon paid for the machinery. There is nothing to indicate that Ross & Nicholson had a right to surrender the property to the Joliet Motor Company and receive their money back or that the Joliet Motor Company could recover the property in the event Ross & Nicholson failed to make a sale. A sale is defined to be an agreement whereby one party called the seller, transfers to the other party called the buyer, the property in goods for a consideration called the price which the buyer pays or agrees to pay. (People vs. Law and Order Club 203 Ill. 127; Close vs. Browne 230 Ill. 236; Benjamin on Sales, Sec. 1 and 3;

*. we wanted bis and in a si meeted noiteseant's plated sale of the tractor to the and that the sement i. in no wise bound by any representations that the properties have that moisteon eas coust viction off .uclings sat st clan au Bear than imp of of an ana row of of there caerabat cat to keep & Mickelson. Upon on a the tion of the record noloulers to melasiable oit it towis eliberates on built ow o more effective the grabites to appropriate and a recording MATERIAL LY DISABILITY OF THE SALE PROPERTY OF THE PARTY opinion that the Icliet actor 00 and all self the tractor, plow and dist to modalise, follow a gid distant more out buff to part of multipowers information cannot be maintained entiret the Johns Housen Consegue. ere forther of the coldina that the transaction between the Soliast Mover Company and Mose & Michelson ass a sale of the -ige out for even gels that ; movie of Mail has well, reteart agents of the Jelies Setor Cammara and that the could net create any lightlify against the Comment by any respective tions they may have made. . Ather the . . o. it to accept Michelson is called a constanten, neverthed so, the purchase grice of the implementer is given in attion at to eat g Michelson who thereusen paid for the mecalifers. There it i ingle . Sai we foodelk a sect. and etacher of guidton Surremise the prepart to the ralies little little. Celled of coire their come, trak or that the velies head terming mondadala w essa area add no garagara add ravesar Alace termeans a select couldes at olsa Leftet whereby one party delike the calker, transfore or the erhes nerty celler the enger, the property in pects for a confide as tion or more to see a comit the duling early believe out (Peerla se. Lew sad Order wird 100 Ink. 1:1; Oner: 90. the start and a start of the last that the second

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Tiedeman on Sales, Sec. 1.) Tested by this definition the evidence in this case shows the seller, the Joliet Motor Company transferred to the buyer, Ross & Nicholson, the property in the tractor, disk and plow for the consideration of \$1,055.00 less five per cent.

Because of the views of the court this casemust be reversed. Since the judgmant is a unit, if reversed as to one defendant it must be reversed as to all. (Enis vs. Capps 12, Ill. 255; Supreme Lodge, etc. vs. Goldberg 175 Ill. 19; Henning vs. Sampsell 236 Ill. 375; Erd et al, vs. Rapid Transit Company of Illinois et al. 206 Ill. App. 351; Kinlock Long Distance Telephone Company vs. Alton B. & E. 210 Ill. App. 540.)

The case will, therefore, be reversed as to the Joliet Motor Company and reversed and remanded as to Ross & Nicholson with a finding of fact that the defendants Ross & Nicholson were not the agents of the Joliet Motor Company and that the Joliet Motor Company is not liable in this action. Because the case must be remanded, for further proceedings, this court expresses no opinion as to the ultimate liability of the defendants, Ross & Nicholson.

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The cost will, therefore, 's reversed at to hose losiet Moser Company and reversed and penemated at to hone to item. The control of the cost of the co

STATE OF ILLINOIS, SECOND DISTRICT. SS. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this Youth day of in the year of our Lord one thousand nine hundred and fiventy.

Clerk of the Appellate Court.



6475

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April, in the year of our Lord one thousand nine hundred and twenty-two, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. DORRANCE DIBELL, Justice.

JUSTUS L. JOHNSON, Clerk.

CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on
the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:



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No. 8

6975

J. W. Wallace, Executor, etc.,

Defendant in Error,

Appeal from the Circuit

fourt of Warren County.

Mary J. Neil, et al,
Plaintiffs in Error.

JONES, J.

C. V. Wallace died testate June 5th, 1917, and letters testamentary were issued to J. W. Wallace. The executor found among the papers of the testator a promissory note in the sum of \$300.00 made by Mary J. Neil payable to E. B. Crenshaw, one of the plaintiffs in error, and secured by a mortgage upon property owned by Mary J. Neil. The Mortgage was signed by Mary J. Neil and her husband, George W. Neil. The executor filed a bill in the Circuit court of Warren County to foreclose the mortgage, making Mary J. Neil, George W. Neil and the Monmouth Homestead & Loam Association, defendants. The last named defendant held a prior mortgage upon the presmises. The executor also had in his possession a note for \$20.00 payable to the testator signed by the plaintiff in error, E. B. Crenshaw. Crenshaw filed a petition asking leave to intervene in the suit. The leave was granted and by order of the court after answer filed by Crenshaw the petition stood as a cross bill. The executor filed his answer thereto. The cross bill sets up that Crenshaw is the sold owner of the aforesaid \$300.00 note and mortgage; that they had been delivered to C. V. Wallace in his lifetime to secure the payment of the said \$30.00 note made by him to Wallace and now held by the executor. On the hearing Mary J. Neil and George W. Neil, makers of the note and mortgage were defaulted but Mary J. Neil joins E. B. Crenshaw as plaintiff in error.

Because the regular master in chancery was interested

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Appeal from the Chrowit

Sourk of Farren Covary.

6875

J. W. Wallace, Executor, etc., Defendant in Error, ws.

iary J. Meil, et al,

Plaintiffs in Freez.

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Q. V. Wellace died westate June 5th, 1917, and letters testamentary were issued to J. T. Wallace. The executor edt al efem grossinerg a restatet såt le eregeg såt gaoma havel sum of \$200.00 made by Mary J. Meil payable to E. E. Creneller, one of the plaintiffs in every, and recured by a mortgang ucon property owned by Mary J. Seil. The Mortgege was signed by Mary J. Hell and her husband, Geerst V. Veth. The encouler filed a bill in the Circuit ocurt of Warren County to forcelese the mortgage, making Mary J. Meil, Coorge W. Neil and the Waterita Harrison in Lond Managhither, Antoniories, The Last named defendant bold a prior wortgage upon the presmises. The executor also had in his possession a note for 180,00 sayable to the sectator signed by the plaintiff in error, R. S. Cremchau, Grenchaw filed a polition seithe leave to intervent in the suit. The leave was granted on by order of the court after answer filled by Orenausw the perition group as a cross bill. The executor filed his uneser thurste. The excess bill 00.00% flererela of to remo blos adt at wanterero tadt ou atea note and morrgans; that they had been delivered to C. V. Vallage in his lifewire to secure the payment of the said 10.00 note made by him to Wallace and now held by the executer of mid yd sham hearing Mary J. Rail and Caorge W. Meil, makers o' als nois and mortquee were defaulted but Mary J. Meil toing T. E. Grenchay as plaintiff in error.

Decause the regular master in changery was inversated

in the prior encumbrance on the premises, the court appointed L. E. Murphy as special master in chancery. He took the evidence at various times and made a report thereof to the court without giving an opportunity to the plaintiff in error Crenshaw to file objections thereto and the court sent the report back to said special master to permit such objections to be filed. Crenshawfiled objections which were overruled and the special master filed his report finding in favor of Wallace and against Crenshaw as to the ownership of the note for \$200.00. The special master had never taken an oath nor filed a bond as special master under the act of 1917, but with this second report he filed an oath. The court approved the report of testimony and there was a decree foreclosing the mortgage for the genefit of Wallace. executor. Crenshaw and Mary J. Neil sued out of this court a writ of error to review the record.

It is urged that the proceedings before the special master were void because he had neither taken an oath nor given a bond as special master. Crenshaw appeared before the special master at various times to take testimony, appeared before the circuit court to get the report re-committed to the special master for objections and thereafter when the report was re-committed to the special master, filed many objections to it but did not make the objection that no oath or bond was filed. The case of Pardridge vs. Ryan 134 Ill, 247 is one for an accounting. The cause was referred to an auditor to take testimony and state the account. The auditor failed to take the oath prescribed by statute. The question raised was whether or not the taking of the oath prescribed by the statute is a prerequisite to jurisdiction or whether there may be a waiver of such oath by the parties. The court said "The weight

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in the prior encumbrance on the premises, the court arraintball Noot SH ed L. E. Marring at appeals master in changery. eff or icerafy fracer a star bus esmit quotiev is conclive court without giving an apportunity to the plaintiff in tree truce sat has offered anotheride elif of wadaners torre -do dove thirty of referm Laborga bine of Mond froger ent jections to be filed. Organizatilet objections ships yers anibail froger aid ball' refer Larouge and has belowere in favor of Wallace and againer Cranabur as to the ownerable of the note for (200.00. The creofal master had never taken an oath ner filed a beal sa special marten under the set of 1917, but with this second revert he tiled an paye. The court approved the report of testiming and first was a decree forcelesing the wortgage for the gracit of Mallocs, ersowicz. Ozenskaw ani Mary J. Neil sued out of this court a writ of error to review the record,

This weget his the proceedings on the special result were were were void tecture he had not that takes an one'ther given a hond we special answer. Obscoming approxed herits the special answer at various times to take testimenty, appeared before the circuit ocurd to yet the report of remaining the 'o're receipt master for octionistic and trerestian when the report was re-consitted to the escaled must er, filled many offsettime to it can did not write the objection sharing the or write the objection sharing the or of the report was rest no orde or hond had at accounting. The one- of Taravidge vs. The antition and take the oeth presented by our reference to another the case we restract to an endirer to take the oeth presented by our reference or not the ability of the other presented by the states in a prerequisite to justication or and or other and any be a maiver of such calcaling as such as a such calcaling of the near the maiver of such calcaling and the self the maiver of such calcaling the self of the self of the self of such calcaling the self of the sel

of authority is in favor of the position that the oath may be waived. A party ought not to be permitted to introduce testimony and to suffer his adversary to introduce testimony before an auditor, and then, when the findings turn out to be adverse to him, make the objection for the first time that the auditor was not sworn. Thus to lie by, and take the chances of a favorable result, is inequitable in such cases, sil noe should be regarded as acquiescence. If the objection that the oath had not been administered is made in apt time, it may be cured and time and expense may be saved. It is not sufficient for the defendants to say, that they did not know of the failure to take the oath until after the report was filed. They knew or were bound to know that the law was. The law required the auditor to be sworn before he entered upon his duties. If they intended to insist upon a compliance with this requirement, they should have made known their intention before the duties were entered upon. The appointment of the court is the source of the auditor's jurisdiction, and his failure to be sworn may be waived by the parties. as it was waived in the case at bar. " The holding in the Ryan case is followed in the case of Garrity vs. Hamburger Co. 136 Ill. 499. We can not distinguish these cases in principle from the case at bar and we hold that Crenshaw by his action in appearing before the special master to take testimony, by his appearance before the circuit court to have the report of the special master re-committed to the special master for the filing of objections to the report and by filing objections to the report without making this specific objection, waived the taking of the oath by the special master.

No error in computation is assigned by the plaintiff in error, Mary J. Neil. By her default she admits liability under the note and mortgage. She would therefore be in no position to complain that the oath was not taken by the special

of suthority is in favor of the position that the outh may be waived. A party ought not to me paraitist to introduce tastirony and to saffer his siverenty to introduce testiagus before an et souvelle et un rouge fondinge for et le office es bit, gold the obj. other for the first time that the said and the not seem. Thus to the by, as that on occase of a flowering -it was figure to rule , sense . our of tirefilpeni of , wireer ten A. e with aft full achieve o only M. . louver simple and he suffice to the contract to any the contract of and excesse may be say in I' is not sufficient for the telephanes, to say, that they did not maps if its fallers to take the coth until mitte the repart the filles. They he were ear sound be know than the law was - It. is everyther the reaworn bufors in wherei upon als inthes. If any istaniak to inrest their yell of memory will the weather a way bits and incentification in the profession of the court and the second -airs at the same and to severe this to court the terminate and Listing Lat 11s Tillion of the group of the Tillion of the gave and at working siff ". Tall su way, his at having our di as oset is followed in the case of darelief at tase 111. 458. We are not distinguish these ours in criminal from al molities with you referred that blod ew less and is seno said aid no graces of the planeter falsers wit those paintages appearance before in circuit court to rive the report of the openial master re-consisted to the openial master on the emplication of this tractor wit of supresside to public to the regent mithout mining this receive objection, with the building of the cuth of the recount which and

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master as required by statute. However, the decree orders the payment of the sum of \$316.27 by Mary J, Neil and George W. Neil to the complainant within forty d-ys together with costs of suit and in default thereof that the special master make sale of the premises subject to the mortgage of the Monmouth Homestead & Loan Association and directs the distribution of the moneys received from such sale. We are of the opinion that the court should have required the special master to file a bond before making such sale.

It is further urged upon the part of the plaintiff in error, Crenshaw, that the finding of the court that the executor is the owner of the note and mortgage in question is against the weight of the evidence and unwarranted by the evidence. While this court has power to review the evidence in the case and determine whether the findings of the trial court are correct, still we are not authorized to disturb the findings of the master when confirmed by the chancellor unless they are manifestly against the weight of the evidence.

(Williams vs. Lindblom 183 Ill. 346; Siegel vs. Andrews & Co. 181 Ill. 350; Treloar vs. Hamilton 225 Ill. 103; North Side Sash & Door Co. vs. Heckt 395 Ill. 515.) In this case there was much conflicting evidence with regard to the ownership of the note and mortgage and we can not say the findings were contrary to the weight of the evidence.

The decree is therefore affirmed in so far as it denies the claims of Crenshaw and provides for a foreclosure in favor of Wallace, but so far as it directs a saleby the special master without his giving a bond, it is reversed, with directions to require the special master to give a bond in a sum double the value of the real estate to be sold and after that bond has been given and approved, the decree for the sale of the real estate in favor of J. W. Wallace, executor for the debt, interest and costs will be entered.

master as required by statute. However, the decree orders the payment of the sum of \$516.37 by Wary J. Tail and Garge W. Weil to the complainest within forty days tope that with occas of sair and in default thereof thus the special master make sale of the premines subject to the nortgage of the Momental Romesteed & Loui Artolation and directs the distribution of the moneys received from cues sale. We are of the opinion that the court should have required the special master to file a bond before making such sale.

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It is further urged upon the part of the plaintiff in error, Grenshar, that the finding of the court that the executor is the comer of the note and revigegs in question is against the seight of the evidence and unvarrentes by the evidence. Units this court was power to review as articutor in the one and determine whether the findings of the trial court are correct, still as are not authorized to dispure the findings of the seight of authorized to dispure the they are manifestly against the reight of the evidence.

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The decree is three ersises in so the safitred in so the as is decision the claims of Grenzian and provides for a serestrure in faror of Wallage, but so the as it directs a milely the special measure without his giving a bond, it is reversely with directions to require the appealabilities to give a bond in a remained the value of the real settle to be end and and a lest that bond his been given and approved, the decise for the sale of the tations of J. W. Wallage, espector for the debt, in a seal ocula will be entered.

TATE OF ILLIN	OIS, as. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
	District of the State of Illinois, and keeper of the Records and Seal thereof,
	he foregoing is a true copy of the opinion of the said Appellate Court in a, of record in my office.
ac above change caus	In Testimony Whereof, I hereunto set my hand and affix the seal of
	said Appellate Court, at Ottawa, thisday of
	in the year of our Lord one thousand
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TATE OF ILLINOIS, SECOND DISTRICT. SS. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof.
o hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
he above entitled cause, of record in my office.
In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, thisday of
in the year of our Lord one thousand
nine hundred and twenty-
Clerk of the Appellate Court.

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AT A TERM OF THE APPELLATE COURT,

7006

Begun and held at Ottawa, on Tuesday, the fourth day of April,
in the year of our Lord one thousand nine hundred and
twenty-two, within and for the Second District of the State
of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice
Hon. AUGUSTUS A. PARTLOW, Justice.
Hon. DORRANCE DIBELL, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on
the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

7006 No. 23.

Orin O. Ogle and Tom Haney, appellees,

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Charles H. Ditto,

appellant.

Appeal from Circuit Court of Henderson.

JONES, J.

The appelles, Orin O. Ogls and Tom Haney, recovered a judgment in an action of assumpsit against appellant, Charles H. Ditto, for \$1160.00 for real estate brokerage commissions. The appellant was the owner of 184 acres of land and on July 13, 1919 the appellee, Tom Haney, had a conversation with the appellant in which he sought to have the appellant list his land with appellees for sale. No definite arrangements were made on this day but on the next day at Keithsburg, Illincis, a conversation was had between appellant and appellees which resulted in an agreement between the parties whereby the appelless were to find a purchaser for appellant's land at a price of \$30,000.00. Appellees were to have as their commissions all the land might bring in excess of \$30,000.00. Appelless almost immediately interested one Hugh O'Malley and priced the land to him at \$190.00 an acre or a total of \$31,160.00. After an inspection of the land by O'Malley and his son the former decided to become the purchaser thereof at the price asked and so notified appellees who in turn notified appellant and arranged a meeting among the parties.

When appellant was advised by appelless that the latter thought they had a purchaser, appellant said to them that he desired to have a reservation made in the deed giving him the right for life to hunt upon the premises. Appellees informed him that they would see what could be done about the matter, whereupon appellant replied in substance, that he would

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The appelled, Orig O. Oglo and ion H acr, reserved a judgment in on action of assumests aquines appellent, Charles M. Disto, for \$1180.00 for real estate brokerses acemseaters. The applicable has been all the agent of head and relatings and ACT TO SELECTION & DAY ASSESS NOT ANALYSIS NOT THE Test conduct to the control to the bit of the control of the control of no efeat to the regardes of alles of selections at the age of is day but on the next day at Petchelurg, Illinoi., . conversation as had betreen appellant and appelless that resulted in in agreement cetteen the parties whereof the appellees are to .00.000,00% to catry a see bask attackleage rol researching a 1 11 ifigir in i out list and state of the court of the state of the court ing in excess of (30,000,00, Aprelice; el.ca, irrectiff . As whe of and sait decerty and you was a sum end lesseroom. 130.06 an agra os a total of [31,160.00. Alter os in rediton art as failthed beneath and has had him partially and had sail has omiteen a long of the contraction of the contraction sating the parties.

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not let the reservation stand in the way nor let it stop the deal. Appellant denies that he made any such remark but we think the evidence shows that he did. O'Malley was informed

by appellees of appellant's desire for the hunting recorvation and O'Malley refused to agree that the reservation should be made and appellees so notified appellant. The agreement between the appellant and appellees was oral, and at the time it was made nothing was said about how payment should be made. During the negotiations appellees suggested to appellant that inasmuch as possession of the premises was not to be delivered to the purchaser until the lat of March next following, some payment down should be made by O'Malley and suggested that it be a sum between \$2,000.00 and \$4,000.00.

On Thursday, July 17, 1919, all of the parties went to Keithsburg where O'Malley made arrangements with the Keithsburg bank for the necessary money with which to buy the farm, and thereafteron the same day the cashier of the Keithsburg bank, J. Ward Bloomer, was asked to prepare a contract between appellant and appellees for the sale of theland. Bloomer testified that he prepared a contract from the information he received from the talk of the men in the room where the parties were assembled. This contract provided for the sale of the farm at a price of \$31,160.00, \$3,500.00 of which was to be paid by the giving of a note by O'Malley to appellant due March 1st, 1920 without interest. The remainder of the purchase price was to be paid at the same time. The deed and the premises were also to be delivered then. Appellant says he read over the contract and discovered an error in the description of the land and that he obseved that there was no hunting reservation mentioned in the contract. He then stated that he wanted to go over to the Citizens Bank where he had some papers and could obtain a correct description. O'Malley

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On Thursday, July 17, 1819, all of the parries rent Soft fifth the management class gail will seem a commentation ifficurg book for the necessary reservation to that the (3.7) urg bin't, J. Ford Bloomer, wes nekel to premare a compreseftern appellent and appelless for its -wise of theliami. lecomer testables that he premared a contract touristes tomost ent saud man att at mem and ho files and more beviener at not with the last little to be a little of the last lit e face at a price of 451,170,00, dt, 40.00 of wite's was . Smitt was it unitable on ofor a to refute out we been Jaroh lat, 1010 elthout interest. The remainder of the ouralway prica is to be paid ut the come tirk. The field all the en type inclient anest hereviled as of sola erev seatmers ide af round go berevoorde to rearingo off neve been description of the land and thir he events rever the part and unting reservation monuteset an the combiner. So then all ded that as wated to go over of the distance Dank care had and papers and could obtgin a correct description. Offgaley

also stated that he wanted to make another trip to the farm and look it over concerningsome fences, the location of which had been described to him by appellant while at the Keithsburg Lank. The parties separated, O'Malley going out to the farm and appellant to the Citizens Bank where he caused a new contract to be wrilten by L. J. Temple, the cashier of that bank. The draft of this contract provided for a cash payment of \$3,500.00 instead of a note for that sum. It also contained a hunting reservation. Temple testified that the contract thus propared by him was a duplicate of the contract prepared by Bloomer with the exception of the description of the premises and the inclusion of the hunting reservation. Appellant signed this contract and left it with Temple. Later appellee, Ogle, went to the Citizens Bank and inspected the said contract. O'Malley never gen' to that bank to sign it. Later in the same day appelless caused Bloomer to draw another contract containing a correct description of theland but omitting the hunting resevation. Bloomer and appelless state that this contract was a duplicate of the first contract drawn by him with the exception of the corrected description of the land. At the time of the trial thr whereabouts of the contract first drawn Ly Bloomer could not be located and it was a question in dispute whether appellant had consented to the acceptance of a note for \$3,500.00 instead of cash. We are of the opinion that the svidence discloses that appellant did consent to accept a note. Not only is such consent indicated by the testimony of the witnesses who were present at the time the first contract drawn by Bloomer was read over in the Keithsburg Bank but it is made more nearly certain by the positive testimony of Bloomer that appellant stated it didn't make any difference to him, the appellant, whether it was a note or cash so long as it was something he could turn into cash any time he wanted to.

per sent till er tille medle side er derlig er tidt per medle THE RESERVE OF THE PARTY OF THE - Allies All - Sally Andrew to all all address and mowing to o two disk your 10 games and any son and -200 . on a product and the same as course of the light the Large rest to be rilled to 1. J. Coming the oresite of the panel. To the spar this is not tellivery tours and the third of a ferjifico cole 'I .que fado con los lestant CG..CB. ing reserviction. For its constituted that the entire of the or brown bording all the conduction of the all graduates occer with the exemption of the description of the produces street brightings and ordered alternative and the and , willigh model indicated thin the Position continue to the Civisers Fallenal targesitt "it sets booksens. Officility marge soof to their our to sign it. Large talthan asar AND RESIDENCE OF THE PARTY OF THE PARTY AND THE PARTY OF maked of well by Mr. Magali W. Milatin Speck Storage of en egit i de la companya de la comp Table of the later end a ..e d to light of fire tradest o conjugate is the substitution of the to make take a part of the behavior of the brane bestell and Make the company of the contract of the state of the fund maintee with to dies of . Jose to bestand Ch.Cit [8] not on n trecon of ancinoo like the firefire to a to elevia ocaleive note. Not only de park assument indignised by the effects of ්වෙත්, කලව ව වැඩි දක්වී දක්වීම මෙම එම වනා ලෙසුවූ ඉතුළුව ලක්ව සමුව පෙන්ව කිරීම ලක්ෂී irwn by Bloomer as rest over in the Med Mademas Rar: but it is rangolid o quotat, on inditiduogo (f. g. ritorass girosa earas sibbu odě jako ou na na čito jmu silan čloniko na konsta finile jmu tadi appolicmi, method it is a state of a long on it was some taing he sould wurd law out and time to mantel to.

Bloomer further testified he replied to appellant that his bank would cash the note any time appellant wanted the money and that the note was good. Appellant upon cross examination stated that he had some talk on Thursday with Bloomer about the note, that there was something said about it; that he didn't remember asking Bloomer about cashing it but he had possibly asked Bloomer if it was good. He also stated that he might have asked Bloomer if he would cash the note for him if he wanted the money and that he believes Bloomer told him he would. We, therefore, conclude that it was a part of the agreement that appellant should accept a note for \$3,900.00.

O'Malley testified that after he had made the trip out to the farm on Thursday it was too late to return to Keithsburg and that he did not do so. Appellee, Haney, testified that on the next morning, it being Friday, July 18, he had a telephone conversation with appellant in which appellant stated that O'Malley had not signed the contract by eight o'clock on the night previous, that it would now take \$300.00 an acre to buy the farm and that the deal was off. Appellant does not give the same version of the conversation. However, he stated that he told Ogle that the contract would be left at the Citizen's Bank until eight o'clock on Thursday evening for the signature of O'Malley, but that he did not know that he told Ogle if the contract was not signed by eight o'clock the deal would fall through.

The evidence tends strongly to show that on the following Saturday, July 19, appellees took the second contract drawn by Bloomer and signed by O'Malley in duplicate together with a note signed by O'Malley for \$3,500.00 payable to appellant March 1st, 1920 to the appellant and asked appellant to accept the note and sign the contract. Appellant declained to

Bloomer further testified herepited to appellant that the money and would cash the note any time appellant wanted the money and that the note was good. Appellant upon prose examination stated that he had some telk on Thursday with Bloomer about the note, that there was something said about it; that he didn't remember acking Bloomer about packing it but he had possibly asked Bloomer if it was good. He also stated that he might have asked Bloomer if he would cash the note for him if he wented the money and that he believes Bloomer told him he would. We, therefore, conclude that it was a part of the segreement that appellant should scoop a note for \$3,800.00.

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accept the note and sign the contract. Appellant decisined to

do either. According to appellees testimony, the declination was based solely on the ground that the contract did not contain a reservation of the hunting privilege. According to appellant's testimony, he declined to sign that kind of a contract and he claims that he stated to appellees that he had a contract prepared at the Citizens Bank and for them to bring their man and they would complete it. He also says that the note was not tendered to him. The negotiations between appellant and O'Malley were thus terminated.

We cannot say that the jury was not justified from the evidence in finding that appellees produced a purchaser, able, ready and willing to buy appellant's land upon the terms agreed to by him. In fact it appears to us that the evidence strongly preponderates in favor of appellees. It can serve no useful purpose for us to speculate as to the reasons appellant may have had for not wanting to sell his land after appellees had produced a purchaser. It makes no difference what his reasons were. Under the circumstances of this case, he had a legal right to decline to sell his land. He had a right either to declare the deal off or to withdrawhis lands entirely from the market but his conduct in doing so did not relieve him of liability to his brokers if they had performed the services for which they were engaged by him. Although appellant does not admit that he told appellee, Haney, the deal was off and that it would now take \$200.00 and acre to buy the land, such an admission, even if he had made it, would not affect his rights or liabilities in this case. O'Malley had been produced prior to the date of this alleged conversation over the telephone and was, as the proof clearly shows, able, ready and willing to buy the land at the price and upon the terms given by appellant to his brokers. It would also be useless for us to discuss the question as to whether or not

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the jury should have deducted from the amount named in thekr verdict, a discount of seven per cent on \$3,500.00 from July 18, 1919 to March 1st, 1920. We have already said that in our opinion the jury properly found that appellant had agreed to accept the note instead of cash and it is equally clear to us that the note which was discussed between Bloomer and appellant, was a note for \$3,500.00 bearing no interest from date to maturity. If appellant had agreed to accept such a note in lieu of cash, hehas no right to ask for any reduction of appellees commissions because of the fact that the note was not an interest bearing note from date. The evidence does not disclose the fact that the note was not worth its face at the time of the alleged tender, but even if it were not worth its face at that time. the appellant is in no position to complain on this appeal because he cannot first raise that question here. He made no objections on that account in the trial court and he can not be permitted to do so now.

We think the evidence in this case showed that appellant had given appelless thirty days time in which to make sale of the land. But this question is of little importance because they produred O'Malley as a purchaser within a week after their contract with appellant was made and it can not be seriously contended under the evidence in this case that any effort was made to terminate their contract and to withdraw the lands from the market until after appelless had produred a purchaser upon the terms prescribed by the appellant. Neither do we think there was any modification of the contract after it was made affecting the quantum of the estate to be conveyed to the purchaser. It is obvious that the evidence does not even tend to show any such modification.

Under the evidence in this case the instructions of the court are not open to the objections made by appellant.

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Under the evidence in this case the instructions of the court are not open to the objections make by appellant.

In our judgment the verdict was fully warranted by the evidence and should not be disturbed.

Judgment affirmed.

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STATE OF ILLINOIS, SECOND DISTRICT. SS. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 10 th day of in the year of our Lord one thousand nine hundred and wenty- two Clerk of the Appellate Court.



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of April,
in the year of our Lord one thousand nine hundred and
twenty-two, within and for the Second District of the State
of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. DORRANCE DIBELL, Justice.

JUSTUS L. JOHNSON, Clerk.

CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on
the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:



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6973 No. 45

Charles W. Pease, Administrator of the Estate of Warren W. Pease. deceased.

appellee.

VS .

Rockford City Traction Company and Rockford and Interurban Railroad Company. appellants.

appeal from the Circuit Court of Winnebago County.

PARTLOW. J.

Warren W. Pease began suit in the circuit court of Winnebago county against the appellants, Rockford City Traction Company and Rockford and Interurban Railway Company to recover damages for personal injuries which he received on July 21, 1914. On February 11, 1915, before the case was tried, Warren W. Pease died and the appellee, who is the administrator of his estate was substituted as party plaintiff. After an amended declaration had been filed, a motion was made by appellants to dismiss the suit. The motionwas allowed and the suit was dismissed. On appeal to this court that judgment was affirmed. 204 Ill. App. 120. A certificate of importance was granted and the Supreme Court, 279 Ill. 513, reversed the judgments of this court and of the circuit court. holding that under the pleadings, the suit was improperly dismissed, and that the fourth count of the declaration stated a good cause of action. The case was then tried in the circuit court, and at the close of the evidence on behalf of the appellee, a motion was made to direct a verdict in favor of the appellants, which motion was allowed and judgment was rendered in favor of the appellants for cost and in bar of the action. A writ of error was sued out of this court and the judgment of the circuit court was reversed. 217 Ill. App. 659. Upon the second trial in the circuit court judgment was rendered in favor of the appellee for \$2850.00 and from that judgment this appeal was prosecuted.

The evidence shows that the appellants maintained, in

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more than the property of the reverse of wasened and Interestable Agillary Consequence of de sa for personal injuries which he received on July 11. 1914. reary 11, 1915, before the case was tried, Marron d. Ness L and the species, which is the salable of the species and the The second secon been filed, a wolder was ande by application to dississ the weit. of Impos mo . secondath and the out has bewolfs appointed in -me i .Ouf ..oA .fil bod .hemitle and showhof that two Illeats of importance was granted and the bars eme Court, 278 131. of , reversed the judements of this court and of the eight send, olding that mader the elecations, the smit was therefore diagraped. To take from a methica mois cristed and le days struct ent fait we The cast was those build in the chromit court, and or the -los of the svilence on behalf of the nonelles, a method was safe the desired a verdict in Auvor of the appeal nos, their a block was ion admillenge sat to moved all berefer ask throught ban bewell to one ham and turne to tire a . notion out to rad at has toos The one rever a w draw discusts saft he drawers and has drawer one 111. up. 669. Upon the account twist in the circuit empty jednyont AND THE RESIDENCE OF THE PARTY OF THE PARTY OF THE PARTY. Liebon to Description of the later of the la

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the city of Rockford, a shop in which their cars were repaired. Warren W. Pease, the deceased, had worked in this shop for four or five years repairing cars. On the night of July 20, 1914, a street car was placed in the shop for repairs, the armature of one of the motors having been blown out. On the next morning, Pease ran the car over the pit on its own power. He took a jack, went into the pit under the car and started to remove the housing from the dead motor. This car had been in service since 1911. It had a single truck, a wooden body, with two motors, two controllers, a double end, and a single truck consisting of four wheels. The framewhich carried the motors was made of steel. There were two rheostats, one on each end of the car. There was a ground cable extending from one end of the car to the other, and a ground wire was soldered to this cable. This ground wire was in the form of a "Y", one branch being fastened to the metal housing of one of the motors and the other to the metal frame. The purpose of this ground wire was to ground the current of electricity and protect the operator of the car from receiving a shock. When Pease got into the pit under the car, he took the lower half of the housing off of the dead motor and disconnected the ground wire above and below the joint of the "Y". He then went to the front end of the car with the controller and attempted to move the car for convenience in further working on it. but the car failed to move. He took the controller to the other end of the car, turned on the electricity and received a severe shock. Immediately after receiving the shock he was found sitting on the floor of the vestibule, or platform, with his head in his hands, in which position he remained for about twenty minutes, after which he got up and walked around. For almost seven months after receiving this shock he was confined to his home and to a hospital. In December, 1914, after an examination, it was determined that he was not suffering from tuberculosis of the lungs, or from tuberculosis in any other part of his body, but it was determined that he had a sarcoma or tumor. He began to cough immediately after the injury and continued to cough until his death.

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hard for him to get his breath. He began to lose weight and continued to lose weight until the time of his death. He had worked for the appellants seven days a week for about three years but after his injury he practically did no work. He was treated by the company physician, Doctor Franklin, until December, 1914, when Doctor Lofgren commenced to treat him, and continued to treat him until the time of his death. Pease died February 11. 1915, and after his death a post-mortem examination was had, which showed that there was a five pound, round cell connective tissue sarcoma, or tumor, in the mediosterno region, infiltrating about the organs including the heart and lungs. The heart was crowded into the left side of the cavity close to the shoulder and was about half the size it should have been in its normal condition. It had been contracted, but aside from that the heart appeared uninjured and normal. The sarcoma was grayish white in color and covered the lungs, the other blood vessels and the whole inside of the chest.

It is first urged as a ground of reversal that appellants owed no duty to the deceased to provide a properly equipped car for him to work upon; that the deceased was employed to repair cars/that were out of order; that it was his duty to make dangerous conditions safe, and simply because the car was out of order that did not constitute such negligence on the part of appellants as would entitle appellee to recover.

The fourth count of the declaration upon which the case was tried alleged that Pease was employed repairing cars, and that the appellants negligently and carelessly permitted the car in question to remain equipped in a dangerous, defective and improper condition, and by and on account of such negligence, certain parts of the car became and were heavily charged with electricity, and while Pease was working on the car, he came in contact with the parts so heavily charged with electricity, and thereby was shocked, bruised, burned and injured externally and internally,

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per condition, and by and an assuant of enals acgligered, embain parts of the ser become and weare investly charged with electricity, and while lease was continued on the care, he came in a mineral rith.

and as a result of such injuries died.

Prior to the accident the appellants had elected not to come under the provisions of the Workmen's Compensation Act and for that reason, under Section 3 of that act, Laws of 1913, p.339, contributary negligence, assumed risk and the negligent act of a fellow servant, do not constitute a defense in this case. Daly vs. New Staunton Coal Company, 280 Ill. 175; Wendzinski vs. Madison Coal Company, 282 Ill. 32; New Staunton Coal Co. vs. Fromm, 286 Ill. 254.

The first question to be determined is whether the appellants were guilty of the negligence charged in the declaration. When this case was before this court the last time upon appeal, 217 Ill. App. 659, we held that the evidence of the appellee fairly tended to prove the charge of negligence as alleged in the declaration, and that the trial court improperly directed a verdict for appellants. The evidence on behalf of appellee on this appeal is substantially the same as on the former appeal, and therefore the appellee, under the former decision of this court, is entitled to recover, unless the evidence offered on behalf of the appellants was sufficient to overcome the case made on behalf of the appellee. The appellants cite many cases in support of their contention that they owed deceased no duty to furnish him a safe place in which to work, but upon examination it will be found that most of the cases, if not all of them, are cases in which the facts are not like those in this case. None of them were cases where the compensation act had removed the defense of contributory negligence and assumed risk. The Supreme Court, in 279 Ill. 513, held that the declaration in this case stated a good cause of action, and that decision is conclusive and binding as far as this appeal is concerned. If appellants owed no duty to deceased, then the declaration did not state a cause of action, and it must follow that if the declaration did constitute a cause

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and restant at Lorimretab and of motreen; trail and and . . who were guilty of the negligence charged in the acclaration. then this year not netter time well the List the easy high nest, . Y ... ipp. 669, we held that the evidence of the appelled 1. L l tended to prove the desproof megaligation at alleged in the - . described and that the trial court improperly directed a verdshift no selfenge to things on considere ent . Theffege a word . I is substanticily the same as on the former angulari, and -! o ore the appelles, under the deriver decidence the acure, itled to recever, unloce the svidence offered on behalf of linio ne chi easo and emocreto of their little saw binklings in of the appolled. The appollants orte many class in swince of or contention the owed door sed no daty to formulah him of Illa stroit nimbo or a sun fina of delia at seeig st some that word or the oracs, if not all of them, and chart in where the test are not like those in this case. Here the ware -m a la parcha, and harman but do molfmanegmen and suche sec u and the second of the factors on the state of the second LY III. 515, held that the declaration in this case trated a Anna dense of estion, and that declared is conclusive on binling for as this creek ha concerned. If applicate aved no mits of the bounded, they had been proportioned and paid, benished to water a relativistic tell to delicate the party of the security of the state of the security o

of action that the appellants owed some duty to the deceased.

It has been held that electricity is a silent, deadly and instantaneous force and all persons handling it are bound to know the dangers incident to its use and to guard against acciden by a degree of care commensurate with the dangers incident to its use. Postal Telegraph Company vs. Likes, 225 Ill. 249; Hausler vs. Commonwealth Electric Company, 240 Ill. 201; Stedwell vs. City of Chicago, 297 Ell. 486. The question is whether the appellants guarded against accident to the deceased with that degree of care commensurate with the dangers which surrounded him. There is no dispute but what the deceased received a violent shock of electricity while he was working on this car. There is considerable conflict in the evidence as to the cause of that shock. The contention of the appellants is that he received it because of his own fault in disconnecting the ground wire and then attempting to move the car. On the other hand, the evidence on behalf of the appellee shows that this car had formerly been wired standard general electric type. In that type of wiring there was a ground cable running directly from the controller in one end of the car to the controller in the other end. There was a post on each of the trucks to which a ground wire was connected from the truck to the ground cable. The binding post to which the ground wire was attached was at the top of the motor casing. There was a gound connection from the ground cable to the top of each motor, and the ground wire attached to the cable was fastened to the truck, making two separate and distinct ground wires, one from each motor. The only way these ground wires could be seen or repaired was by taking up a trap door over each motor in the floor of the car. They could not be reached from the pit under the car. The wire that was used to connect the ground cable to the binding post was a No. 2 flexible wire, consisting of a number of strands of fine wire. If both ground wires were removed the car could not be moved unless a short circuit was made, but

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to make the all and there are no the time beauty desired and have which the property of the sale of the property branch will show JARRENI Ble-dub SAS ISIV (SEC GARLIUS PIRO IS PRIMES . . im tee. destal telegraph Company vs. siles, 228 111. 249: figures vs. Commonwealth Alectric Conveny, 840 Ill. 1941: - 1941: AND RECORDED OF ANY AND ADDRESS OF ANY and Fact with Landward and it wear teat white the land and the little of and delicatives illing excepts with other elementation that by earth the interpretation was the december personal at the start of all and the start of t ut satricity while he was norking on this can. There is com-. Moode that he came out of er endemes of ni tellino of neg specien of the special and a test a received to be continued a production of the contract o move the car. On the other hand, the evidence on bah lf bout need alabatoh bai and this fedt eword efficate for to ereal meinin in eget falls al .cops state is faroned bash om mi reflected and directly dress the scuttefilm and out the cer ac the controller in the other and. There are - on each of the tracks to which a ground wire the evaluation delds of tree called and .elder lawring out of fourt out The ground wire the est sale to ear head of the creat with horas and The was a gound connection from the ground course to the tope than't saw chars car of dedecate etta hawary edt bas aratom dest to and to the tenel, sainth two ose rate can distinct Advant circle. " from each motor. The only way those around which conidio ಗ! - ೧೯೬೮ ಜಲ್ಲರ ಇಲ್ಲಾರ ೧೮೦ಥ ನಿ. ಇಕ್ಕೆ ಇ ಇದು ಇಟ್ಟಿಕೆ ಕೈಗೆ ಇದರ ಕೆಕ್ಕಾತಿಕ್ಕೂಗ ಇರಿ 🕕 🕕 e floor of the ear. They sould not be ranched from the six inder the cer. The sire that who what to compet the graum colli-- in gridstance , cary sidingly a sol y pay face amituid ods o ment of the story of the wire. If soth prouse wires to remember of the .al. . any limits tunds a section mayor of ton five ass

the ground wire from one motor could be removed without removing the ground wire from the other motor.

The armature in this car had blown out prior to the injury causing one of the motors to be what is called a dead motor, and the other motor, to which no damage had been done, was the live motor. The evidence shows that this standard general type of wiring which was formerly on the car had been changed before the accident, and another system, above described, had been substituted. The deceased had been working on the dead motor and had done nothing to the live motor. There was, on the dead motor, a piece of one strand copper wire which, in the absence of other ground wires, acted to ground the current, and when this wire was disconnected below and above the "Y" there was no ground wire from the live motor to protect the operator of the car from a charge of electricity. The deceased had been working in the pit from which the ground wire could not be reached had it been standard general electric type. As it was wired, the live motor had no ground wire, neither motor was equipped with a ground wire in the usual and ordinary way from the ground cable to the binding post on the top of the motor. If both motors had been grounded with a ground wire to the ground cable the deceased would not have been injured. After disconnecting the wires on the dead motor, but without touching the live motor, the deceased attempted to move the car and was shocked. Appellants' claim that the wiring on the car as it existed at that time was the usual and customary way of wiring cars, and that the deceased knew this fact; that it was not necessary to have more than one ground wire or one ground in the system.

The charge in the declaration is that the appellants negligently and carelessly permitted the car to be and remain equipped in a dangerous, defective and improper condition. There is evidence amply tending to show that the manner in which this was was wired at the time of the accident was not proper, and was unsafe.

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The constants in this or in Flore eat a fee to the defect. Fro , water such a believe at dear of or protected to one and eall out the contract and entire of notion of trator andso the with to sout furnes, remains, with their exode conditive off . ing which was forearly on the total been charged before the secident, and another spites, site assembles, had sem midstitated. The decembed and hear northing on the level notice and inch ned to a transfer of retre wire will the cose se of other and white a world to ground the current, and when title wire were worth order harvers on some successfully onto some month base wolfed bedonate in the enumber a month who end to not now out tooton of noton evil The accepted had recently the fire the right of the right accepted to the right of the ground vira could not ne ranged had it been plandant on busi roton ovil and , whole bear this . . const sintage . whole wire, neither actor was equipped with a ground wire in the dura emimenió sud ad allama Birrara add merti rew gramibro des a un o a drive before of the meter. If both action had hear some of the act need over the record cable the december weath net the contract Injury, the sale of the ball of the sale o when the court is a second to the court of patient traffic the name of the color of the co the same in the later and the same of the me to the transfer our second of soft his community to TO DESIGN HIS TO SEE A COUNTY OF THE REAL PROPERTY OF THE PARTY OF THE antin of

The charge in the reclaration is that the appeal into negalg offy and careficerly penalited the car to be and set in equipped
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dence amply toring to show this the manner in which this was what
fired at the time of the meeters was not proper, and was wheater.

There is a conflict in the evidence on this point. Witnesses testified on both sides of the question. We think, however, the eyidence shows that the car was, some time prior to the accident, wired with two ground wires; that the deceased was not familiar with the change which had been made in the wiring of this car and for that reason disconnected all ground wires and received the shock. It was purely a question of fact for the jury to determine from the evidence whether the appellants were guilty of the negligence charged in the declaration, and from a careful examination of the evidence, we cannot say that the jury was not justified in finding that the appellants were guilty of the negligence as charged.

It is admitted that deceased died as the result of a sarcoma, but the question is whether the shock to the deceased caused the sarcoma which resulted in his death. The appellants claim that during the early part of 1914, the deceased had been failing in health and while at work he would often drop his hands, and be short of breath; that his breath was constantly foul and could be smelled several feet away, and it smelled like burnt flesh; that he had for years prior thereto complained of heart trouble and had received a pension on that ground; that in the early spring of 1914 he was told that his daughter was sick in a hospital in Rockford and he said he could not go to her on account of his heart trouble and could not stand it. On the other hand, it is contended by appellee, that prior to the accident, deceased had been in fairly good health; that he had worked seven days a week for two or three years before the accident; that it was not until after the accident that his breath became foul, but that after that it did become foul and smelled like burnt flesh; that after the accident he had difficulty in breathing; that he gradually grew worse until his death.

Dr. F. Robert Zeit was called as a witness for appellee. For

the charge which had been mais in the wiring of this ear for that reason aimsected all ground wires and respication of that reason aimsected all ground wires and respication of the west nursic question of the cridence hather the countries were guilter was not the did find the cridence, we country say that the fury was not the did in finding that the appointment of the guilty of the pagiliant were guilty of the pagiliant.

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twenty-one years he had been a teacher of pathology as Northwestern University Medical School. He was the attending pathologist at Wesley Hospital, Mercy Hospital, Grant Hospital, Alexian Brothers Hospital, in Chicago, and consulting pathologist for a number of other institutions. He testified that he saw sarcoma every day, and that, in his opinion, it was caused by two elements combining, first, an inherited predisposition towards nalignant tumor, and, second, an injury to the tissue; that he had studied electricity and was acquainted with its effect upon the human body: that the effect of electricity upon the tissues was to cause tetanic contraction of the muscles of the arms and chest, and the tissue in the chest, and the reaction, when the currect was taken off, would cause a tearing or injury to the tissues; that any voltage of electricity which was sufficient to shock or jolt a person coming in contact with it through the hands would cause injury to the tissue; that such injury, in connection with a predisposition towards malignant tumor, would cause the tumor to grow. A long, hypothetical question was then put to him by counsel for appellee, and he was asked if he would have an opinion from that question whether there was any connection between the sarcoma found in the deceased and the jolt or shock that he received on the street car, and he answered "yes." He was then asked what that opinion was and he answered; "due to the violent muscular contraction, caused by the electric current passing through the chest, an injury of the tissue took place. which was afterwards followed by a malignant tumor in the mediosternum, which afterwards caused the death." On behalf of the appellants five physicians, three of whom were in the employ of the appellants, testified that it was not possible to tell what caused this sarcoma.

On account of the sharp conflict in the evidence upon this question which was so controlling, we have read the evidence of these experts with considerable care. We are convinced that the

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witness for the appellee is one of the leading experts upon t question of sarcoma. His ability and great experience are rec nized and admitted by the other expert witnesses in the case. I had come in contract with it almost every day for many years, he studied it and taught it, even to some of the other experts in If the jury saw fit to give to his opinion more weigh: than they did to the other witnesses on this subject we cannot say they were not justified in so doing from all the facts in evidence. Fease was not quite sixty-nine years old on the day of the accident. He was probably not in the best of health but he was able to work seven days a week and had done so for several After he received this shock he worked only a few days. Symptoms of infirmities appeared from the hour of the injury, and he continued to grow worse until he died. After his death a post-mcrtem revealed that sarcoma was the cause of his death. There was evidence tending to show that this sarcoma was the result of this injury. What is the proximate cause of an injury is ordinarily a question of fact for a jury, to be determined from a consideration of all the attending facts and circumstances. It only becomes a question of law, when the facts are not only not in dispute, but are such that there can be no difference in the judgment of reasonable men in the inference to be drawn therefrom. Schultz v. Ericksson Co. 264 Ill. 156. The employer is liable in case of injury caused by his negligence, even though the injured person is suffering from some predisposition which aggravates and intensifies the injury. Peoria Terminal Company vs. Industrial Board, 279 Ill. 352; Wabash Railroad Company vs. Industrial Commission, 286 Ill. 194; Spring Valley Coal Company vs. Industrial (Commission, 289 Ill. 315. We think the findings as to the cause of death are in accordance with the evidence and we do not feel justified in setting aside the verdict of the jury on that point.

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Appellants contend that the hypothetical question put to Doctor Zeit, and his answer thereto were improper, because they violate the rule that where there is a conflict in evidence as to whether a person was injured in the manner claimed, it is notcompetent for witnesses to give their opinion on that subject, and several cases are cited in support of this rule. We do not think the question and answer were improper. The rule with reference to a physician testifying is that where the immediate cause of death is not disputed, it is competent for an expert medical witness to give his opinion as to the cause which resulted in death. Devine vs. Chicago City Railway, 195 Ill. App. 304; Alpe vs. Sup. Coal Company, 208 Ill. App. 67; Kimbrough vs. Chicago City Railway Company, 272 Ill. 71; Squire Dingee Co. vs. Industrial Board, 281 Ill. 359. It is not disputed that the death of the deceased was caused by the sarcoma, and the testimony of the witness was merely the expression of his opinion as to whether that sarcoma was caused by the electric shock which the deceased received. This question and answer were not in violation of the rule. But even if the question and answer were improper, appellants were in no position to complain of the error, for the reason that similar questions were asked and answered by the witnesses who testified on behalf of appellants. In each case the questions covered all of the facts and the experts were asked to express their opinion based upon the facts as stated.

The deposition of the deceased was taken a few days before his death, and at its close he was asked whether there was anything else he ought to state. He answered that the piece of wire that was put on for the ground wire was just a piece of common wire and not put on as it ought to be. Complaint is made of this question but the only objection made to it is that it was immaterial. After the question was answered no motion was made to exclude the answer. The question was proper, the last part of the answer was improper,

of the noiteens : the course of the state of the all named to be not been all a world where had also one attacked to the all it is being a second by the best of the control of the ball of the tent for althouses to give their opinion on that ambject, upi High to no of the rains of this rain. To no not tell the as comercian with also real . The real several and statement of the comercian and several as a s they be again about and areas for an antificiant pricepar a amostly lacker force is not force at \$1 ,00000010 for af plicate at helicone name and of the manner of artists of AN ARLA AND AREA ALL AND ARREST MALE AND THE AREA AND ARREST ARREST AND ARREST AND ARREST AND ARREST AND ARREST AND ARREST ARREST AND ARREST AND ARREST ARREST AND ARREST ARREST AND ARREST ARREST ARREST AND ARREST AND ASSESSED OF PROPERTY AND AND ADDRESS OF COLUMN ASSESSED. bettern between the fill of a proper of the parties of the NOT IN ADDRESS OF FOLLOWING THE PARTY AND ADDRESS OF A PERSON. description of the state of the First statument has be recovery a sale for personnels and others have been -in this and any minus from a high-in and of belong her potential all be called to all the part to the last and the part of the miles of the court of the court was a seen and the part of the court of are in no position to demilian of the error, for the reason Reseastive edi ya bomesan am nedes erev baciteway relimis and issure this case agas of . stanific a to highed no boilitest our nations of higher growt always that has about all the the house on charters was entired with a country was all to dealers a basic

The deposition of the isconded was taken a new ways before the death, and it its alone he was asked whether there at a supraing to be the to asked the capito of which the chart the capito to state. As an are the chart the chart to be. Complaint is made of this question of the confy objection and to it is that is that is the chart the chart to be to it is that is the chart the chart the chart to be to it is that is the interval at the chart the chart the chart the chart to be acceptant. Although the chart of the chart was the chart of the chart of the chart was the chart of the chart was the chart of the chart of the chart was the chart of the chart of the chart was the chart of the chart was the chart of the chart of the chart was the chart of the ch

but as no motion seems to have been made to exclude the imprope: part, the appellant cannot complain.

Certain questions were asked Charles Pease, a son of deceased, pertaining to the appearance and acts of his father several days after his injury. He testified that he saw his father sitting in a chair; that he stayed at home about all the afternoon and saw something about his father that day that he had not seen before. The question was asked what it was, and he answered that his face was drawn and he appeared to be suffering a great deal of pain. A motion was made to strike the answer, it was denied and the witness continued that the position he was sitting in made him think he was suffering pain; that he was sitting stradule of a chair with his arms over the back of it. We have examined this part of the evidence and in each instance the question asked was proper, and in each instance a part of the answer was proper, but the motion to strike out the answer covered the entire answer and was not limited to the part which was improper. On account of a proper motion not having been made the court properly refused to strike the entire answer.

over the objection of appellants, Charles Pease was permitted to testify that a car equipped with two motors was improperly wired where there was no ground wire from the ground cable to the truck; that a car having one live motor and one dead motor was unsafe to move where there was no ground wire from the truck to the ground cable; that in order to ground the currect with a common one strand wire it would have to be connected in Number Two field wire. Complaint is made of the admission of all of this evidence. Before testifying the witness qualified as an expert electrician. He was the man who had originally wired this car, as he testified, according to the standard electric type. Whether this car was properly wired and whether the manner in which it was wired was unsafe were not matters of common knowledge. When the facts upon which opinions are founded cannot be ascertained and made intelligible to the court

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Some any steel state of the same at the same at the same redidit its in eren the our results of gointerer,) tid one of full self-flast all symplei aid noths symb - the out if a draw poor in began as rady raints and outside another be an interest and could reach that the second publication and has presently actions, the before the question as relatived it has, and he seea appealing of the Estation of the name has been sent fully become of .nowing the strike to strike the announce, it was not only long our doubt handless a smaller all him belong new AND OF REAL PROPERTY AND ADDRESS OF THE ADDRESS OF bishing your of the executive and the Pear still become being all the first the second and the second at the s ment are solved at each and little broad his negative and the latter part of married from the first pressed and the part of the part not not such and applied that without wines & To Salman at 170000 er topogerly retured to obtifue the entire energy.

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and jury, the opinion of expert witnesses may be received.

Gunderlach vs. Schott, 192 Ill. 509; Henrietta Coal Company vs.

Campbell, 2ll Ill. 216; Chicago vs. McNally, 227 Ill. 14;

Hamilton vs. Spring Valley Coal Co. 149 Ill. App. 10; Wordorski

vs. Illinois Steel Co., 160 Ill. App. 390; Keefe vs. Armour,

171 Ill. App. 573.

We find no reversible error and the judgment will be affirmed.

Judgment affirmed.

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service described

STATE OF ILLINOIS, ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court.
n and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof.
lo hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in
the above entitled cause, of record in my office.
In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court. at Ottawa, thisday of
in the year of our Lord one thousand
nine hundred and twenty-



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independent oil was a association.

Appallas.

CIRCUIT COURT.

VB.

THE BATIONAL CITY BANK OF CHIMAGO.

Appellant.

225 I.A. 548

wa. Presiding metter dryse belivered the opinion of the court.

This is an appeal by defendent from a judgment rendered in favor of the plaintiff in the Circuit Court of Cook County for the sum of \$5,435.

In the declaration filed in the cause the plaintiff alleged in asbatance that the defendant had received from the United States Deverment 30,000 face value of liberty bunds for delivery to plaintiff; that it refused to deliver the ande to plaintiff and converted and disposed of them to its own use.

emptorily instructed the jury to find the issues for the plaintiff, the jury returned a verdict as directed and judgment associated thereon. The evidence introduced on the trial shows that
the plaintiff is an organization of refiners and jobbers of
petroleum and that it maintained an office in Onloage of which
one J. . Specht and in charge. The officers of the company
were as follows: N. J. Byrne, President; G. I. Sweney, Vice
Freeldent; J. A. Specht, recretary and J. . Grant, Treasurer.
Specht alone of the above efficers resided in Onloage at the time
of the alleged conversion of the bonds. On October 11, 1917,
the plaintiff, by resolution authorized wency and Syrne to employ
a secretary and they "as a committee diff sepley specht." I weary
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with Speckt; that we minute had been kept of the directors meeting which referred to the appointment of speakt, but that he knew that Speckt was present when the matter was discussed and explained to the board. This memorandum which Swency testified was signed by Syrne and speckt was offered in evidence and was excluded. A part of the excluded agreement is as follows:

"The secretary " " " whall keep collected promptly all meneye due the association from whatever source, and shall during the first week of such menth fursish the directors with a "trial balance" or statement showing the financial condition of the association including, first, seah received during month and from whom, second, cash expenditures, to whom paid; third bills and accounts receivable and bills and accounts payable."

The principal facts in connection with the transaction out of which grew the litigation are not in dispute. There is evidence which shows that Specht had for semetime acted as secretary of plaintiff corporation and that he was in general charge of its business and office in Chicago.

It undertook to receive applications and payments for fourth
Liberty bonds. In October, 1918, the plaintiff subscribed for
\$5,000 of fourth Liberty bonds and an initial payment was made by
specht, who, acting for plaintiff, sent plaintiff's check from
New York city to Chicago. Plaintiff's subscription and first
payment on the bonds were received by defendant October 21, 1918,
and it delivered to plaintiff a subscription receipt upon which
it noted the initial payment. Thereafter other installments were
poid on the bonds by a woman in plaintiff's supley. January 31,
1919. Speckt delivered to defendant bank plaintiff's check signed
by Grant, plaintiff's treasurer, for a finel payment on the bonds.

Pecht surrendered the subscription receipt cord and defeadant
turned over the bonds to him and he delivered to it a receipt as
follows:

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\$5,000 face value United States Government Fourth Liberty Lorn Bonds in fulfillment of subscription.

Sate Jan. 31, 1919.

(Signature) Independent Oil Men's Assn., J. A. Specht, Secy.

February 24, 1919, Specht absconded with money and securities, the property of plaintiff, among which was the bonds in question. April 11, 1919, the plaintiff, through its treasurer. Grant, node a demand upon defendant for a delivery of the bonds to him. Selivery was not made and plaintiff brought out for a conversion of what it says is its property.

To sign checks against an account which plaintiff kept in the defendant bank. Arrangements for the opening of this account were made by Specht. Grant, the treasurer, was not a member of plaintiff's board of directors and he spent but little time at its office. He testified that he had probably spent three days a mouth in plaintiff's Chicago office during the period that Specht was in charge.

The assistant manager of defendant's bond department testified that Grant had informed him that he, Grant, in order to carry on plaintiff's business in Chicago had found it expedient to leave signed blank checks for the use of specht. Specht, acting for plaintiff, had been a party to the original subscription for the bonds; he made the first and final payments due thereon; he was employed to conduct plaintiff's business by Syrne and Iwaney, who had been delegated by defendant's board of directors to make the contract under which Specht had agreed to devete all of his energy and best efforts in the line of his duty as plaintiff's accretary. The agreement provided that he was to endeaver to build up plaintiff's membership and "seep collected promptly all monies due the association from whatever nearce" and to "furnish the directors with trial belonces or statements showing the financial condition

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of the association, including cach receive during the month and from whom, cash supersistres, to show paid; tills and receive receivable and payable; also to reside in Catego or one of its suburbs and be at the office during business hours except when necessarily absent therefrom in the line of duty."

It is our spinion that the instrument excluded from the evidence and from which the above protections are taken should have been exhitted, even though it appears that it was not signed by Juney, who was delegated with Torne to enter into the contract. This instrument was produced from the files of the plaintiff company.

This is not, so we read the record, a case where, as seems to be the position taken by the plaintiff, the question of the agent 's implied authority is in issue.

In Jackson Febru Note, 10. v. Conservable Nat. Note, 199
Ill. 181, the Supreme Court held that where one seeks to take
advantage of the act of an agent, it is for him to show the
authority of the agent. As we view the record before us, the
defendant cought by tender of the contract in question to show that
actual authority was vested in Specht to receive the preparty on
behalf of the plaintiff. The instrument, if admitted, would have
tended to preve that Specht and actual authority to milect and
receive all monies due plaintiff from whatever rearce, and it is
our opinion that under this contract, when taken in connection
with the other evidence introduced in the case which tended to
show specht's general on therity to transact business for plaintiff, the court should have submitted the case to the jury.

taken singly us one of the several foots shows by the evidence was sufficient to charge the plaintiff with responsibility for pacht's action. However, when due consideration is given to his undoubted authority to transact husiness generally on

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behalf of plaintiff; that Grant, in order to enable the latter to transact business on bobelf of plaintiff had entracted him with signed blank cheeks; that specht was authorized under his employment centract to collect all nonies due the plaintiff and, in fact, had transacted its business generally with the defendant beak and had pessession of the subscription receipts, sufficient evidence was momitted for plaintiff to authorize the trial judge in malmitting the question of specht's actual outhority to receipt for the bonds to the jury. Those facts taken together with the excluded instrument furnish some evidence of actual sutherity wested in Specht to receive the bonds.

Plaintiff made no complaint of tpecht's alleged unauthorized conduct for at least mix weaks after speckt had absconded with the bands and other property belonging to claimtiff. He was not by any means a stranger to the plaintiff, and if it can be held that he in fact exceeded his actual authority, then, as think, the has imposed upon the plaintiff the daty of promptly regularing his action. If wealt has actual methority to remote the bonds than the defendant was not guilty of negligence in turning them over to him. so do not think that plaintiff was called upon to repudints speckt's conduct simply because he had assumed to sign e receipt for the bonds on behalf of plaintiff. The fact neces to be that 'pocht was plaintiff's scoretary and that he had wide general powers to transact its business in Chicago, and if in the exercise of those powers, which were known to the defendant, and while summing to not for his principal, he overstopped his authority, then the plaintiff would be required to repudinte him conduct so soon as it become aware of it. The case is not similar to the asse of sigged Gil Company v. J. . Express Jo., 388 Ill. 186, where the controversy concerned unsutherized conduct on the part of defendant and one walsh, in which case the court said:

error in the property of the p Attended his survey of the stiller all feet to tel frames builded in per all . Williams to series by the property of the same of the same of the allow of ear 14 th the avenues and all tempera a street one of fee TO BE A TOWN TO A STORY OF THE THE TOWN OF THE TOWN AND A STORY OF THE TOWN OF The second of th where the mean department and a project of the valori i sa kala kala kala gilika kukale nininga nininga m Attachment to the Welleton description of the with a sign of the last spiritual of the other terms, and said ar gran in a grand was a first of immendation over in the The same of the contract of th observations of the arms of the statement of the statemen and employed the interest of the later of th College for the college of the colle at the second will be a second to the second of the second our or transmit healthfrom the contract and the contract and the Like from the complete of the first termination for the first

"The question was whether the person who made the endorsements had apparent authority to make them as agent of the plaintiff, and it was held that if the course of dealing between the agent and third persons was such as to justify them in believing that he possessed the requisite authority the plaintiff rould be estopped from disputing it."

In the case of ward v. Williams, 26 Ill. 647, the Supreme Court paid:

"In general, where as agent is authorized to do an act, and he trenscends his authority, it is the duty of the principal to repudiate the act as soon as he is fully informed of what has thus been deno in his neme by the agent, else he will be bound by the act as having ratified it by implication; but where a stranger, in the name of another, does an unsuthorized set, the latter need take no notice of it, although informed of the set thus done in his name, and he shall only be bound by an affirmative ratification."

If it can be said that Specht had no authority whatsoever to receipt for the bands on behalf of the plaintiff, then his act in so doing constituted a forgery.

In Findley v. Corn Exchange National Bank, 166 Ill.
App. 57, it was held:

The authorities are all agreed that in a case of this kind it is the duty of the depositor to notify the bank immediately upon his discovery of the forgory. There is some controversy in the authorities as to what results shall follow the breach by the depositor of his duty in this respect. We think the trend of Allineis excess is that the depositor who fails to notify his bank of the forgories as some as they are discovered loses all right of action against the bank."

The Circuit Court erred in peremptorily instructing the jury to find for the defendant and in excluding the instrument above referred to.

The judgment of the Circuit Court is reversed and the cause is remanded to that court for a new trial.

SEVERGED AND REMANDED.

Moderely and Matchett, JJ., concur.

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ACREST BURGERS and CHARLES V EVERENS, Dain; Indianas under the Piro Hame and Viyle of ROBERT BURGERS & Dung, Appellante. APPEAR THOM MUNICIPAL CONST

225 LA. 648

MR. PRESIDING JUSTICS DEVEN DELIVERED THE GRIECON OF THE COURT.

Plaintiff recovered a judgment in the Municipal court of Chicago against defendants for the sum of \$2054.82, which the defendants sook: to reverse by aspeal to this court.

Suit was originally brought against the defendants doing business under a first name, and also against Nebert Nurgess, one of the defendants, individually. On the trial, at the close of plaintiff's case, the court on motion of counsel for defendants discussed the suit as to Robert Nurgess individually.

A point is made that the order dismissing the smit as to Surgess was not correctly made or entered. We do not think, however, that there is merit in the point. A statement of claim filed alleges that plaintiff delivered a horse named "Judge" to defendants for sale; that defendants sold the heree to one 3. 3. White and received therefor the sam of \$3850; that the defendants, though often requested, had failed to pay the amount received for the horse to plaintiff. In an affidavit of merits the defendants alleged that they had received for the horse in question a note for the sam of \$1,000, which they had discounted at an expense of \$80; that elaintiff was indebted to defendants for veterinary services, food for and maintenance of the horse in the sam of

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\$923.60, and also that plaintiff had directed defendants to invest any balance due his in other horses.

The case was tried before the court and a jury. The evidence introduced on betalf of the plaintiff tended to above that both parties to the lithration were engaged in the business of breeding horses; that in 1911 one of the defendents had said to plaintiff that he would like to deew plaintiff's horse in company with four horses owned by defendants at a stock show to be hold in Unious. Finistiff Lestiffs that he relationtly a pend to percit his horse to be shown as requested; that he did so under an agreement with the defendants that they would coll the horse for him "without cost." Plaintiff's testimony is that one of the defendants "was to show him free of cost to me and get all I won with him." Plaintiff offpped the horse to defendants and it was exhibited at the International abov, where it won a price. Defendants thereafter sold it to one White, and the plaintiff testified that defendants had failed to report the sale to him and had never paid his anything for the horse; that he became apprised of the sale by reading a notice in "Breeder's Casette."

Defendant Robert Burgoes, called under Section 33 of the Municipal Court act, testified that at the time he made the arrangement with plaintiff he was acting for the partnership of Robert Burgoes & Son. Robert Burgoes in testifying admitted that he cold plaintiff's horse to L. H. Thite in February, 1312, and that he received a note therefor for the sum of \$1000.

The principal controverted question of fact in the case, however, centers about the disposition by defendants of a horse named "Iblis." Robert Burgess testified that he imported the latter horse from France and had sold him in Neverber, 1910, to one Eumen for \$1900. L. E. Shite testified that he purchased

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THE R P. LEWIS CO., LANSING MICH. LANSING, MICH. LANSING, MICH. LANSING, MICH. ness or makes the court of the produce the product of the product o the graph of the control of the cont es vered ersstummati titti ver silf itsiss ve trila The state of the s MADE IN COLUMN TO TAXABLE PROPERTY AND ADDRESS OF REAL PROPERTY AND ADDRESS OF TAXABLE PARTY. on his or half proposity at more as he happy all there are BUT I HE WAS DONE OUT ADMINISTRATION OF PARTY DESCRIPTION OF TAKEN been for all purpose orthogonal "plans socials" on nel propi All the last the second control of the second control of the the street of print of health bright. Table life 8897 wasten with the second present to the term of the large terms. Claim, of the court of purification of a state of the court was to the and all more than the relation of the first below the first party of t the second or the second sea and the partition she shape their held their Facilities and processed that receive to pulsoon on particular and his bookings.

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the horse "Judge" from defendants; that before that time he had parchased the horse "Iblis" from them for [1950]; that seem time later he discovered that the latter horse was undefind and he returned it to defendants, one of whem promised witness that he would less him a horse until "they would get one to suit us, of equal value;" that some time after the return of "Iblis" he.

White, had accepted plaintiff's horse "Judge" in exchange for "Iblis;" that at this time the defendant Charles surgess said he would let the witness have the horse "Judge" for the horse which witness had returned to defendants and the miness' note for \$1000. The witness testified very definitely that he had paid defendants 1000 for Talis;" that he had exchanged him for the horse "Judge" and in addition had given for the latter the sit-ness' note for \$1000; that the fair cash market value of "Judge" at the time was \$2000.

The testimony of the defendants centradicte that of thite and plaintiff in important particulars. Their tentionny is to the effect that in the first instance "This" was sold to Hamen. that the latter was Thite's employer, and that the purchase price paid by Hamen for the horse was \$1200.

Defendants' evidence was that "Judge" was sold to
Thite for the Jloco note, and that this transaction did not include
the defendants' or White's dealings with the horse "Iblis:" that
after "Iblis" had been sold to Hanen the latter had shipped him
back to defendants' barns. White testified that when "Iblis" was
returned to defendants' barn he, the witness, had consined horses
in defendants' possession, and finding none the equal of "Iblis"
had agreed with defendants that they were later to give him a horse
squalling the value of "Iblis." White testified that some menths
after the return of "Iblis" he entered into the deal with defendants
for the sale to him, White, of plaintiff's horse.

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The evidence is in direct conflict on the controverted questions of fact in the case. The trial Judge and jury were in a such more favorable position to pass upon these questions than are we. It is impossible to reconcile testimony so conflicting, and we are therefore unable to say that the verdict of the jury is against the veright of the evidence. This is true not only of the evidence touching the nature of translations in issue, but also eith reference to the value of the horses in question.

The judgment of the Hunicipal court is affirmed.

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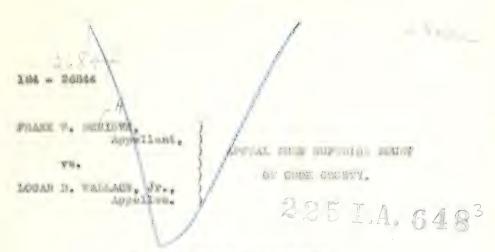
Meinrely and Matchett, Ff., concur.

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The plaintiff brought an action in the Superior court of Cook county against defendant to recover for personal injuries mustained in a collision between an automobile and a sectoryple.

The declaration, which consisted of one court, charged that the plaintiff, a meteroyale policemen, while in the set of yer-wains a speeding automobile was injured through the negligence of the defendant. At the close of plaintiff's case the jury which beard the evidence, in compliance with an instruction of the court found the defendant not guilty. A jet must was entered upon this wordest and plaintiff appeals.

August 11, 1918, plaintiff, a meteroyale policion employed by
the Village of Riveroide, was injured while puroding a speeding
natosobile moving on Desplaines evenue in east village; that the
emicosobile was neving, in violation of the law, at the rate of
Il miles as hour for a distance of about two-tenties of a mile.
Plaintiff testified that he was traveling morth at the time he
followed and passed the speeding ear; that as he cought up with
defendant's automobile ha, plaintiff, but his speed from to about
his miles as hour; that he had passed two automobiles and later
had cought up with defendant's car, which was also provesting north;
that as plaintiff was about to pass this third ear and after the



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front wheel of the meteroyale had passed the hab cap of its rear wheel, defendant, without giving any signal or warning of his instantion so to do, suddenly many to the west and plaintiff's setorayale collided with the automobile.

Flaintiff further testified that he had counsed an electric horn on his neteroyale when he was about to pass defendant's car; that no street intersected Benglaines avenue at the place of the accident; that defendant had looked book and "when I was about to pass his car are he turned west. He was going north, looked book, and when he looked book it second that he turned his whole body and swung his our to the left, turning toward his left." Flaintiff testified also that he was going about 12 miles on hour when the collision occurred.

We think there was sufficient evidence to serrant the submission of the issues of fact relead by the pleadings to the Jury.

the declaration and the proof as would variant taking the case from the jury. The declaration charged that the defendant so careleasly and maght only trove the attraction that it struck and military against plaintiff's neteroyate. We think under this allegation the jury, if it believed plaintiff's testimony, could conclude that the accident was the result of a collision between the actoryate and the nuturable and that each had struck against the other. The general rule is as stated by convert for defendant. Julia Series and the facts as testified to by plaintiff. The centimony of plaintiff and other witnesses is to the effect that just before the accident happened the plaintiff was driving on the west side of a north and south struct; that in compliance with the law he had a tempted to pass to the laft of a seving automobile, when the latter, extingut

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varning to plaintiff, turned to the left and the vahiolog collides. On this testimony the case should have been embedited to the jury.

The judgment of the Superior court will be reversed and the cause remarked to that court for a new trial.

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Moderaly and Natobatt, JJ., concur.

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BITTHY STOLIK,

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CHICAGO RAILWAYA COEPARY, CHICAGO CITY RAILWAY COEPARY, GALUET & SCUTH CHICAGO MAIL AY JOHNANT, and the ACUTHUM ATHUIT HALLWAY, Operating Under the Lame and Style of Chicago Surface Lines, Appellants, 225 I.A. 648⁴

APPEAL FROM SUPERIOR COURT OF GGGR COUNTY.

MR. PRESIDING JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Seary Stulik, plaintiff, at about eight o'clock Sunday evening, February 14, 1918, was riding in a coutherly direction on South Faulina street, a morth and south street, in an autosobile owned by him. Flaintiff at the time sat in the rear seat of the autosobile; his asphew, the driver of the car, sat in the front seat on the left side, and the latter's brother George Stulik sat at his right. As the autosobile was driven across 14th street, an east and sear street, in the city of Chicage, it was street, an east and sear street, in the city of Chicage, it was struck by an east-bound/ear running on the south one o' two etreet railway tracks laid down in 14th street and thereby plaintiff sustained injuries for which he brought sait spaines defendants. A jury returned a verdict for the sum of \$12,000 in favor of the elaintiff. Judgment was entered on the verdict, which defendants seek to reverse.

A principal contention on behalf of defendants is that recevery is barred by contributory neglicance; that the evidence fairly establishes one of two propositions - first, that plaintiff or his driver did not look before crossing the truck; or, second, that plaintiff or his driver did look and saw the street car coming closely at hand, and had deliberately assumed the risk of

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gressing the tracks.

new trial, we do not mean to intinue that the evidence establishes any fact in issue between the parties, or shows that elaintiff or the driver of the autosobile were free from contributory regitagence. It is our epinion that the question of contributory negations under the evidence introduced was properly unbotted to the jury by the trial Judge. It seems to be conceded that the driver of the automobile was at the time of the accident in the employ of plaintiff, and that the negligence of the driver, if any, must be imputed to plaintiff.

Henry B. Stulik, the driver of the automobile, died some time before the case was tried.

Plaintiff testified that on the evening in question he was riding in his automobile and that his nephew Henry was driving; that he did not remember approaching 14th street and that he had no resolvention of what happened fust before or at the that the socident occurred.

Flaintiff's neghew George Stulik, who sat in the right front seat of the automobile, testified that his deceased brother was a licensed chanffeur; that just before the accident happened the automobile in which the witness was inding approached 14th street at a speed of from 15 to 12 miles an hour; that when it was 15 or 35 feet north of the morth building line on 14th street the driver tooted his horn, pushed out the clutch and put on the brakes to slacken speed; that the machine slowed down to a speed of about four or five miles an hour; that the driver looked east and west, and that he, the witness, did the same thing; that "when I looked to the west I did not see any care or vehicles approaching. The driver them released the brake, put in the clutch and started across. It gradually increased in seed so that se were going air

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to eight miles an hour as we eroused the street our tracks. The front and of the saturabile was about elx feet morth of the street car tracks when he released the bruke and put in the clutch; " that from that time until he got onto the tracks "he looked east and west;" that he, witness, looked about, but did not see any street car approaching from the west just before the autombile started norose the south tracks on Faulina Street; that there were some people on the street, but no vehicles; that as the automobile was grossing the tracks he lid not hear a gong promise on the except car: that the automobile was struck at the hub of the rear wisel on the right side by an east-bound street car and it was "thrown through a 90 degree angle; it was now facing north about 76 feet from chare it was struck;" that after the collision the street car ran a distance of about 300 feet past Poulina street; that at the time of the assident the street was dry; that the automobile did not change its course up to the rims of the collision; that it continued in a straight line couth. "so our right wheels were at all times about six feet from the mirb;" that it was a clear evening and there was nothing to obstruct his, vitness, view.

feet west of the west line of Faulina street. Jeenge Stulik Lestified that just before the collision he naw a train passing on
the structure; that he for a third time loosed westward along the
cant-bound track and saw the glaring light of a street car for the
first time when it was four or five feet away; that at this time
the automobile was going about eight miles an hour; that he heard
the rumbling of the elevated train when he passed 14th street,
but that he did not hear the approaching street car.

A store and residence building was located on the morthwest corner of lith and North Faulina streets, but it was not so situated as to obstruct the line of vision of the persons

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in the automobile in much manner as to prevent them from seeing the approaching east-bound car.

David Rose, a witness for plaintiff, testified that at and before the time of the accident he was riding upon the Front platfor of the east-bound street car; that one blocks west of Phuling street the motor on had been encoused in talking over "our matters with a man who got off the our at Robey atreat; that the motorman at this time seemed senswhat excited; that after the street car had reached a point night or ten feet east of the Metropolitan elevated railway structure the witness drew the intermals attention to the automobile, outen was south-bound on "aulina street: that at this time the automobile was "coming out" of Faciline etreet onto 19th street; that the ettness said to the motornan, "Here is the machine coming out of muline street;" test he, the vitness, had noted test just before the accident "the handle which he" (the metarum) "wave, controls the motor with, was right close up against to this here stop, and I know when I ees that, I know that is the time they have full good on the car." This witness testified that the car stopped after the accident more than half a block east of Faulina street, and that the automebile was found forty or fifty feet away from the point of collision. Upon crass-examination as stated that he was a weigh expited at the time of and just before the againent. It is arged with some reason, that the testimony of this witness was materially real and on propo-exactination. To testified that an aid not note that the automobile stackenedup just before it asis optod to aross the cost-bound tracks and that he had "no idea now fast the etreet our or outemobile were going;" that the healtights of the street our were burning.

One Lipenski, a driver of a soul truck, testifying for defendants, stated that he was on the southwest corner of the

سالهم ومعلي والمعالدة وما الألام والمراجع المراجع المراجع المراجع green and its interest to be an extra the Land of the second of the seco by have balled than last year health happing and in sentially to an it was not built at the receive beautiful account action to will had at only grown for was out the imp and every many therefore present because out and it is properties artica e il elegioni anti un un più appara a l'ellege TVI miggs smale it with producting species, it is also to the contraction of . A ferm we the grown of an abstract a without was born "They gated at their of thomeson only but a riked on about its r in the state of the contract a Protection of protest and assistant later The part of the last term assessed by the college of the college o and the said files goes some will of scalar Two and the protect feet are goes much a best to be to a family The store is the first of the store of the state of the s and the contract of the contra The taking the agent from the first two gifted from a man a first to a gifted the first agent a to entre the fill of the content of the resemble to the second of the se In part 1 to an above the second second to the second to be believed. parties and a series of the prooffers are agreed to The state of the s the second secon performed as a control of the first performance of the second following and

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interportion at the time of and just unions the accident; that he first saw the automobile when it was about 160 feet north of the north line of lith street; that at this time the front end of the cost-bound street our was 50 feet from the west side of Paulina atrest; that free tids time he entohed both wellcles up I the acoldest ecourred; that the automobile so it entered lith etreet was going about twenty-live to thirty miles on hour, and the street car was moving about eight to twelve miles an hour; that the automobile did not change its speed before the accidant occurred; that it had turned to the left toward the east; that the motornun was ringing the boll on the car; that the notoman shat off the power and that No, the vitness, could hear the brukes and age make seeing from under the braces; that the street car was lighted in the unual namor, headlight burning and invide lights berning; that after the appliant the street car stopped on the east side of l'unline street with the front and at the east building line, "no that it left the back and of the car blocking up Faction street;" that he helped a man out of the autocobile and brought him to the drug store on the northeast corner of the atreet; that is doing so he passed in front of the east and of the street our; that when he came out of the drug wiers he noticed the car had been moved about a longth und that the back and then obsared the cost walk; that the street car was never down in the middle of the phock. On cross-examination he stated that two headlights were burning on the automobile.

One Small, a police officer, a witness for defendant, testified that he arrived near the scene of the accident after it scenared and when plaintiff was in the drug store; when he, the witness, left the drug store, he found that the street was was to the sant side of Paulina street; that "the rear end of the par wasn't what you would call plear agrees the sidewalk." herebre, a police officer, testifying for defendants, correspond at the testions.

THE ROOM AND ADDRESS OF A PARTY OF THE ROOM OF THE PARTY equipment of the second of the The contract of the contract o and the first of t the side of the particular class contributes and while saled sorth facility at \$1000000. the statut with process in the addression will been provinced families the state of the state or territory below to the species from taking ATTENDED BY ANY PROPERTY OF THE ATTENDED BY A TALL THE PERSON ASSESSMENT AND AND HE WAS ADDRESSED TO THE REST THROUGH THE ADDRESS THE ADDRESS THE ADDRESS. many and appropriate the rate of the party o ment has report part that food assertant our date; cost that are detailed. the party and the property of the property of THE RESERVE OF THE PARTY OF THE PARTY AND PARTY AND THE PARTY. AND REAL PROPERTY PROPERTY AND ADDRESS OF TAXABLE ADDRESS OF TAXABLE AND ADDRESS OF TAXABLE SHORT AND THE TAXABLE THAT AND AND ANALYSIS TO SHORE AND ADDRESS. not first it must be positionally described from all the law event and allies A control of the property of the control of the contr ા. . . . મુ લા લા કાર્યા છે. સામે જીવા માજારાયા કે at the contract of the structure of the that he down a process have send but his site and but you have the last tool and the color of the last of the last of the last of and the property of the contract of the contra , of the contract of the contr

of Small.

Potor J. Keen, the motorcom on the street our in question, tentified that the applicant commend between eight and nime of clock in the evening That his car was moving at the pate of about 18 miles an hour when at a distance of about 76 feet west of the west prospeals "I released my power and consted up to the west crosswalk; sounded my gong. Got out the middle of the wort presents and I noticed up out ambite at the morth grosswilk, about the building line. I was about I or 5 feat east of the west organish, when the automobile kept on coving, and about the middle of the driveway between the ours and west-bound track it surved and then the mate of the many and in front of the and show the middle of fauline was ween I bit him. My car west on about 25 or 30 feet, even with the cast building line, at which I stopped. leaving the automobile on the coutheast sorner facing north, cares Before the conductor once back I moved the our to clear the traffic line. After I malled up the first time I atopped the back and of my our fact cost of the crosswalk. I was in that socition when his scaladiop was book," while witness further testified that when he first new the automobile at the north crosswalk the street our was moving at the cate of lo miles an hour and the speed of the automobile was 30 to 35 miles on hour: that "I turned in my air and throw off my power and rang the gong twice. I had a slippery rull that night." He decied the testimony of Rose that he had discussed the war that evening with a passenger or that any one had informed his of the approach of the automobile, and he stated that the exced of the water would ke all not an in or street the time the within a trace are the until it was struck.

Frank Typohoper for defendant testified that he was the conductor on the street car is question; that before the mo-

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to that it is to talk to done by all at appearing an according with

eldent the car had stopped at Wood atrect, a morth and south street, next west of Saulina street; that his attention was attracted at Faulina street by the sound of a anguan the breating of glass; that the speed of the street car at the time was 10 or 12 miles an hour; that at this time the front end of the street car was about in the middle part of Pauline atreet; that the car stopped with its front and even with the preparty line on the east side of Paulina street and the back and was in the middle of the street; that he went to the drug store with the injured man and that when he came out the street car had been moved about a car length.

Devald Saufmann, tootifying for defendant, stated that he was a pussonger on the street our at the time of the accident and was piding on the front platform to the left of the motorman; that he did not hear appliedy warn the motorous or call his attention to anything; that his attention was first at resten to the impending secident by the clanding of the boll, the scatting off of the power, and putting on the brakes; that at this time the front ont of the car was about at the west processik sleep to the Pauline street driveway; that the strass saw an nuts, oblic coning ents the west-bound track on 14th street and that at this time the front end of the automobile was probably five foot porth of the wort-bound track; that the street car was then going about 18 miles as hour and the automobile sesped to be going faster; that it swerved to the loft "and out out" him middle of our track about the middle of the street; that the street car stmick the automo . bile at the rear and, and that at the time the street car stopped ite front and was about at the east building line of Poulina street; that after the accident the sutemblie stood at the southeast corner of the streets and was headed about northoast: that persons taking the injured man to a drug store located on

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the northeast corner of the streets passed in front of the asst and of the street car; that after the assident the street car pulled up a ear length and cleared the alteredk.

It is cornectly contended that the driver of the auto-obile was mility or contributory asglicules just before and at the time of the accident, and this argument finds much support in the evidence. Three witnesses to the accident have testimony for defendants union, if believed by the jury, would prevent a recovery in the case. The testimony of these witnesses, if true. indicates that, whatever may be said as to the conduct of the motornan, the driver of the automobile was guilty of negligence which proximately contributed to agues the speldent in question, Novewer, the syldence of these three witnesses is in the main contradicted by George Stulik and David Ross, who toot Fied for the plaintiff. The automobile just after the applicat stook some distance south of the east-bound trooks and was headed in a direction almost directly opposite to that is which it has been moving before the appliant. This fact is some evidence that the street our struck the mutumobile with much force. The evidence shows that the glass in the front end of the street car was broken and that the motornes had sustained some injuries. Seerge Stalik and David Rose both may that the street our after the necident stopped in the middle of the block east of the intersection. Their testimony in this particular, however, in contradicted by defendant's vituesees, including the two police officers the came to the scene of the aggident after it had occurred.

Botwithstanding the fact that the timory of defendante us to the cause and discumstances attending the aucident finds strong support in the evidence, it is our view that the quection of plaintiff's contributory negligeness or that of his driver, were questions which were properly submitted to the jury.

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In Schlauder . Chicago & Scuthern Traction Co., 283

"there is a presention of low that every person will priors be suty ajoine by law or income by control, and anticipation of neglicance is not a daily with also law important. It is a subject to the presention is a law in the free prior in the last strength is a first to rely selections of neglicance, it is suited to be a right to rely selecty upon it is regulating his own conduct. The presumption does not absolve one from exercising such care and produces as a reasonably prudent person would under the some directions."

The evidence tembs to prove that the driver of the automobile had an unobstructed view of the equil tracks on lith street toward the west. There is some evidence that he slackered the speed of his automobile a sourt distance north of these tracks and that he looked along the tracks toward the wort before he ut-There is evidence of a panein, train on the clotempted to oress. vated railway structure located 120 feet west of Paulius street. and also that the motorman was warned of the sonroading autombbile when the atreet car was a short distance east of the elevated structure. Whether the driver of the automobile did in fact observe the approaching street our and whether, under the circumstances which actually existed, he had reasonable grounds to believe that there was time for him to pass ever the nest-bound tracks in safety, were questions of fact which the jury, who heard and our the vitnesses, were in a small better position to determine than are we.

There is testimony in the record which tends to prove that at and just before the time of the accident the street car was running at full speed, and this testimony is supported by the effect of the impact upon the automobile. The automobile was a large six-cylinder vehicle, and it was struck with such force and in such manner that immediately after the accident it stood at the scatterest of the intersection, headed north. Two situates

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may that after the accident the street car ran a distance of about one-half block.

In the case of Libby, Beliefly i Libby v. Gook, 222 III. 205, the Supreme court hald down the rule that where in the record there is any evidence from which, if it stood about, the fury could, without acting unreasonably, find that the actorial everyones of the declaration have been proven, the case about on to the jury.

In Chicago & Joliet S. R. Co. v. Yanig, 230 111. 558,

the court said:

"appellant further issists that under the proof in this case, the negligence of appeller is falling to look ast listen is a westion of law, riting The poon on Begligence, and other authorities. This court in Chicago a look was a litter falling by the last that this was a matter of law, it has since been recently held in this state that this was a matter of law, it has since been recently held that it cament be sid as a matter of law, that a traveler is bound to look or listen, because there may be various offying sires to see, assume him falling to look or listen if misled without his fault, or the view may be obstructed by objects ar by darkness, and other and louder accions may interfere with his hearing. It seems to us impossible that there should be a rule of law as to what particular thing a person is bound to do for his protection in the diversity of cases that constantly arise, and the meation what a reasonably various person would do for his can majety under like circumstances must be left to the jury as one of fact."

In the case of C. l. A. A. T. v. Pollosk, 195 Ill.

pends upon the circumstances of each page. Source are not at liberty to may, as a matter of law, that one sust conduct himself in a particular manner and abserve a certain line of numbers in a particular manner and abserve a certain line of numbers in a cast cular manner and abserve a certain line of numbers in a content of law, alone, unless the acts constituting it are of such a character that all reasonable non would concur in pronouncing them so. Suppose to us, on first view, that a man placed in a perious condition should to a certain ling, a yet, then we have heard all the facts and circumstances, we may well reach the conclusion that in doin, the entirely opposite thing, is successful the highest care of which the direct times would into the cuestion is no longer as open one.

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 The evidence in the record before us, introduced on behalf of plaintiff, if it stood alone and uncontradicted sould be sufficient to authorize a verdict in his favor, and although, as stated, this evidence to contradicted by a master of vitacones who testified for the defendant, we do not feel varyanted in holding, as a matter of fact or law, that the jury which tried the case could not have found plaintiff or his driver free from contributory negligence.

The trial Judge refused to give to the jury the following instruction tendered by defendants:

"2. The court instructs you that if you believe from the evidence, under the instructions of the court that before the automobile was friven acress or upon the street car track on the occasion in question, either the plaintiff or the driver of the automobile saw the street car approaching, and knew that said car was coming at such a rate of speed that the automobile could not cross said track without being struck by said car, unless said car should be stopped or slackened in speed, and that with such knowledge - if you find that either the plaintiff or his driver had such how large - either the plaintiff or his driver deliberately took the chances of crossing said track in eafety, then the plaintiff cannot rever in this case and your vertict should be in favor of the defendants."

The instruction announces a correct principle of lew.

Chicago Union Traction to v. Jacobson, 317 111., 434. The particular purpose is giving the instruction was to inform the jury that if the plaintiff or his driver actually may the approaching street car and knew that it was running at such rate of speed that the automobile could not with safety pass in front of it, and that the plaintiff's driver nevertheless deliberately teak the abunded of crossing, such conduct mounted to negligence. The instruction is predicated upon actual knowledge of the driver or plaintiff of the approach of the street one.

instructions. Instruction number 10 deals in the main with the juty of the driver of a vehicle about to oress a street car track

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to look and ascertain whether a street our is approaching.

Instruction member 13 told the jury that plaintiff could not recover "for the failure to ring the ball or gong" if the plaintiff or his driver see the defendants' car approaching in time to avoid the applicant.

Instruction number 13 told the jury in general terms that the plaintiff could not recover if he or his driver were guilty of negligence which preximately contributed to cause the injuries to plaintiff.

Instructions musters 16 and 17 are both general in their terms and are seartimes described as stock instructions. Instruction number 16 told the jury that if plaintiff or his driver by the exercise of reasonable care could have evalued the injury to plaintiff, the plaintiff could not recover. Instruction number 17 recites that it was as such the duty of the servants in charge of the ear to evold colliding with plaintiff's automobile as it was the duty of plaintiff's driver to look for and to avoid colliding with the street car.

tendered by defendants should have been given. This instruction in substance told the jury that if the evidence showed that the automobile in question was being operated at a rate of speed greater than was reasonable, having regard to the traffic and use of the way, etc., and that such rate of speed proximately contributed in any degree to bring about the injuries, to plaintiff, then plaintiff could not recover. The instruction in its first paragraph correctly stated the statutory law of the State of Illinois, and whom properly read did not make preof of the unreasonable rate of speed conclusive evidence as against plaintiff. It morel, intermed the jury that they were to find defendants not guilty if they believed from the evidence that a violation of

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the law had proximately contributed to cause the injury.

complaint is made of the giving or refusing to give other instructions, as to which we express no opinion. These questions may not arise upon another trial.

For the error of the court in refusing to give sertain instructions tendered on becalf of defendants, the judgment of the Superior court will be reversed and the cause remanded to that court for a new trial.

REVERSED AND REDANDED.

Matchett, J., concurs.

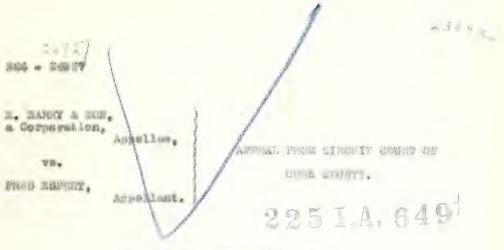
McGurely, J., concurring in part. I us of the opinion that the negligent driving of the automobile scutributed to the actionst, and that the judgment should be reversed with a finding of facto.

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RELIVERED THE CHIMICA OF THE COURT.

The defendant appeals from a judgment rendered against him in the Circuit court of Cock County for the num of 3061.31.

An action of answerit was brought by claimiff for the value of material furnished and services rendered in making cortain repairs on improve ante on real entate ormet by defaulant. As a defense to the action the defendant plouded the general femie and also filed a special plea, which set up that plaintiff had accepted defendant's eleck for 1600,37 in fall satile at up) satisfaction of the amount alleged to be due plaintiff. In a replication to defendant's special plan are plantiff excessed that at the 3030.37 received from telephonic by plantiff, dvo. 30 case in full payment of a liquidated believes due under another and a Afficrent contract free that continued in the Analogation, and that \$31.10 was credited to defendant; that at the time plaintiff received the said 9820.37 me been fide dispute entered between the purties as to how much was due the plaintiff. A general and appelal desirver filed by derendent to the rectionsion was over-roled and lowe was joined on the allegations of the replication.

The evidence tends to show that the defendant had agreed under a written contract to pay plaintiff the sum of \$3716.10 for the doing of the work provided for in the contract:

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plaintiff against defendant "as extras." Defendant was represented by one Wanless, who consulted with plaintiff and gave directions as to the work and had also examined bills presented by plaintiff. During the progress of the work several objections were made by Wanless to the work; he had disputed the extras and had taken exception to certain charges in the bills presented by plaintiff.

The work provided for in the contractwas completed in May, 1918, and for some time thereafter the parties to the suit were unable to agree upon the balance due. There is some contradiction in the evidence, but we think it fairly appears that between the time of the conclusion of the work and July 29, 1918, the parties were unable to agree upon this balance. On the latter date Wanless delivered to plaintiff defendant's check for \$820.37 and took a receipt therefor. The check recited upon its face that it was given "in full of a/c to date," and the receipt which was delivered by plaintiff at the time it received the check is as follows:

"Chicago, Ill., July 29th, 1918.

Received of Fred Espert the sum of Eight Hundred twenty Dollars thirty-seven cents (\$820.37), which is in full payment of all demands to date, and particularly for the work done and labor furnished in connection with the building operations at the Klufer property at Kankakee, Ill., partly covered by contract and otherwise, and in giving this receipt in full it is understood that there are no unpaid bills outstanding for material or labor which will in any way cause or may be the means of any mechanic's liens upon said building or property and such is hereby certified to by me.

Paid

M. Barry & Son Per J. E. Barry."

The evidence in the case is voluminous and it is in some particulars contradictory; but it is our opinion that it shows that an actual and bona fide dispute existed between the parties. The record does not present a case where it can be said that the things in dispute related solely to matters of computation. Nor does the evidence show that plaintiff's claim was for a certain

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I may the progress of the verm sercuel objections were made by and the to the work; he had disputed the example out had butten each to the work; he had disputed the example out had butten each to the work; he had disputed the observant had butten each to certain sharges in the bills presented by plainfiff.

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The evidence is the case is volutions of it is anous of it is in a purpose purcison that it shows purpose find the interest of the case of

and liquidated arount. The orthonor discloses that defendant had no personal knowledge of the nations in dispute between his representative and plaintiff, but an association of the orthonor introduced on behalf of both partice leaves little doubt that prior to the receipt of the chack and the giving of the receipt Vanless and plaintiff's representative had been empaged in a genuine discuss on to the balance due plaintiff.

In deciding the case of <u>Santan Seal Sa.</u> v. <u>Farlin</u>.

"The mount decree the error to parties. "I make the time to the parties. "I make the time to the parties." I want to the time the time to the time the time to the time the time time to the time of the demand, would amount to accord and entire time."

If it could be held here, as unged for the plaintiff, that plaintiff had received the check as part payment only of a fixed and certain amount which was due it, then the receipt of the check or the giving of the receipt would not bar a recovery for the whole amount actually doe. In such due the agreement to receive a part of the indebtedness for the whole amount due small be without considerables. This payment whole amount due small be without considerables.

In the case of <u>Leaven Hool Co</u>. v. Parlin, sited above, the Supreme court further said:

"To constitute an accord and actinization it is merescary that the soney or check or shallower is effored, should be officed in the formal of the formal as a condition that if the party to when it is offered taken it he does at in entirization of his doesel. If the offer is made in such a manner and it is accepted, the acceptance will entiry the doesed, although the creditor protocts at the time the amount received is not all that is due nim or that he does not ascept it in full extinaction of his claim. The creditor has no alternative exact to accept what is offered with the condition upon which it is offered or to refuse it, and if he accept that he results to accept what is offered with the condition upon which it is offered or to refuse it, and if he accept that he results he may note to the contrary."

In the case of learns v. Inc. L. Surna Amber Sa., 187

111. App., 276, it was maid, "that the existence of bong files is

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the dispute on the part of the subter is such easer is a question of fact, and as much belongs to the jury to decide." It is ansorted that under this helling the question of the bong fides of the dispute was properly adoption to the fary. It is enite true that the questioner bone flies as to a discute are in many cases questions of fact which misuals be submitted to the just. but cases may arise whore the evidence is of such character that but one conclusion as to the character of the dispute may be held, and we think this wase is included mone the latter. Here the parties were in constant dispute as to the fair and reasonable value of material farmiched and pervises randered, the value of which had never been fined by the parties either before or after the work was completed. The evidence is clear that both Vanlagand plaintiff's representative, who received the check and gove the Protipt, definitely understood that the chock was to be received and the receipt given in payment of a claim made by plaintiff, the fairness of wotch Tabless had rescatedly questioned. It is our epinion, therefore, that the judgment of the Chronic court must be reversed and the cause remaded to that court.

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McGurely and Massiest, II., concur.

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plemental bill prayed for a decree of diverse from his wife.
Temple Erneotine Hammedy, on a statutory charge of adultery.
Defendant filed an answer to the bill, in which she decide all of its material allegations, and also a cross bill, in which she charged that the was living separate and apart from complainant without her fault, and she prayed therein for a decree of separate saintenance. Complainant decide the raterial allegations of the cross bill. The case was tried before the Chanceller, who entered a decree for diverce in favor of the complainant, and defendant's trees bill was dismissed for want of equity. Defendant scene by writ of error to reverse this decree. Defendant insists that the decree entered is against the weight of the cridence.

The parties to the litigation were married in Arkaness in July, 1964, and lived together as mun and wife for some time thereafter. The evidence intreduced on behalf of the complainant tonds to prove that the defendant semetime in the year 1986, at Fine Bluff, Arkaness, had improper relations with one R. L. Junes.

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A copy of a letter written to defendant by Jenes was introduced in evidence on proof of loss of the original, which tends to show that specify were then a more friendly relationship existed between the defendant and Jones. Further evidence offered by complainest tends to show also that she had been unduly intigate with one Victor Simons in Arkadses, and that improper relations had been sustained with him after she, defendant, had soved to Chicago and while complainant was serving as a lieutenant in the United States Army in France.

A witness for complainant, Georgia Perter, testified that the defendant lived in her, witness, howe in Obicago; that while there the defendant had admitted different men to her room.

The evidence in the case is conflicting. Defendant, by herself and by witnesses, denied the testimony of compliment's witnesses, but there is a placevidence in the record in support of the decree entered by the trial court.

The doores of the Superior court is affirmed.

Medurely and Matchett, JJ., accour.

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ALYTAIN MANA MONICEPAL COURT O Des El Jales.

225 LA 649

The Malling Junesco bevon DIMINERO THE OFFICE OF THE COURT.

Flaintiff brought mit in trover in the Sunicipal court of Chicago for the value of an automobile.

The case was heard by the court without a fury and Judgment was rendered in favor of the plaintiff for the mes of 3500. Defendant seeks to reverse this judgment by his appeal to this court.

For defendant it is said that the statement of claim filed in the assects insufficient, although in the brief filed by defendant it is repited that "the issues relacd by the pleadings were on the overtions of wrengral engovering and decrees.

The statement of claim charges in substance that the defendant obtained from elaintles by false and franchal at representations a Cadillas automobile, which at the time was being repaired at a repair shop in Chicago, Illinois; that the defendant appeared at the repair thep and wrongfully claimed the automobile as its property. The deferdant filed an uffidavit of merits in which it stated that it did not make any false or franchient representations to the plaintiff, and that defendant "bought and paid for said automobile from a parson in lawful possension of same, with the authority to sell the same, "

The abstract of record fails to disclose that the definition to the sufficient of the statement of claim. It filed on affidavit of marite thereto and look issue 60

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 upon its allegations. The objection to the statement of ciain, being made for the first time in this court, comes too late.

It is our opinion also that there was sufficient ovidence introduced on behalf of the plaintiff to varrant the finding and judgment in his favor. Plaintiff testified that he was the owner of the automobile in question; that he had taken the car to a repair shop for repairs by one Harry Landon; that the next time he new the automobile it was in defendant's yard; that it had been taken apart and junked.

fails to show the value of the antimobile. Mr. Spencer, who tertified that he had been in the antimobile business for fifteen
years and had bought and sold cars, testified that he had seen
the oar in quention; that he had had it in his shop for repairs
in June or July, 1910, and that its then market value was approximately \$650. Mr. Nelson, a truck distributor, testified that
the our was worth \$650. Plaintiff testified that he owned the
ear in June, 1919, and that he had sent it to the repair shop
two or three mentur later.

while there is now conflict in the evidence concerning the value of the car, we are unable to vey that the trial Judge errod in fixing the value at \$300.

The judgment of the Municipal court is affirmed.

AFFIRED.

Modurely and Matchett, JJ., concur.

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MINNIN JACOBE,

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BARRY CACSSEAN.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

225 I.A. 6494

MR. PRESIDING JUSTICE DEVOE DELIVERED THE OFFICE

June 3, 1919, appelled delivered a diamend ring in purn to appellant. Earry Gressman, a licensed parm broker, to sequent the payment of \$70 borrowed from him by appelled.

brokerage business, together with all articles and property then in please to him, to one Jacob Elein, who was also a pawn broker and whose place of business was at Ruleted street, Chicago, two or three doors from the place where appellant had carried on his business.

There seems to be no dispute as to any material fact in issue between the parties. The evidence shows that on Jamiary 8, 1921, Klein's place of business was entered by four armed robbers; the clerks amployed therein were ordered to hold up their bands, and a safe was rubbed of a large number of articles, smong them being the dissond ring in question.

There is an unimportant dispute in the evidence as to whether the appelles or her sister, after the sale of angellant's business to Elein, had called on the latter and had secured an additional lean upon a dissond ring, not the one in question here. The evidence on this point shows, we think, that appelles's sister and not the appelles was involved in this transaction.

Councel for appellant inelet, first, that a pawn broker is bound only to the exercise of ordinary care of pledged



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property, and, second, that a pawn broker has the right to satisfy or sell his interest in an article placed with him. It may be senceded that where the ballessi is for the satural beautiful of the balles and the baller, the ferror sill be held to the energies of only ordinary care in relation to the property pledged. This is the rule as laid fown by all of the Illinois cases sited by counsel, not one of which, however, deals with a sledge or pass of goods with a pawn broker. It may be assumed for the purposes of the present case, that the appellant acted in good faith when he transferred his business and property to Klein.

Under appellant's contract with appelles had he a right. without her consent, to relieve himself from a personal liability to her by transferring her property, in which troublant had only a limited interest, to blein, thereby relieving appoint from all responsibility for the exferring and roturn of the proporty? We one will dispute the general principle of salkent as contensed for by appullant, but we think it extremely doubtful that that principle may be extended so as to permit the appointment a assign to a third person, a stranger to appolles, not only appollant's interest in the property, but also the duty imposed upon him by the contract to safely keep and return/to appolles on demand and on payment to appallant of the money horrowed with internet. Appellant's position is that he could by voluntary of turn over to another the duty of safely keeping and protecting the property pledged with him. It is our opinion that under a reasonable construction of the contract in question, when due consideration is given to the character of the business conducted by appellant and the terms of the contract itself, as syldenced by the receipt lives appelles by appellant, that appullant could not by an assignment transfer his Hability to another. Counsel sits and quote from

property of the published AVII. Decidery of Statistical States printed the second of the reserve from the control of placement and spatially a time for resistance filled at continuous are personally at reliable the section of the property of the property and the party of the party TATELOGICAL TO THE COMMENT OF MALE AND ADDRESS OF THE PARTY NAMED IN SECURED IN ASSESSED AS RELIGIOUS, Divining that principle Silversian had THE REST LAND SPECIAL RESIDENCE AND ADDRESS OF THE PARTY The state of the s of females in the control female of bounds a proper Mari of M ed and even ment of any offerents are appropriate at densely. The state of the s we have the second of the seco which we can also type the property and the other The state of the second se the same of the latest section in the case of the case Armonia in an armonia a companyo has the right to assign or soll his interest in an article pledged with him. The authorities and cases sited at first reading seem to support the contention made. These authorities hold that in certain cases as assigned of pledger property may acquire by assignment the rights of the pledger and that the rights of an assignee of pledged property will be protected as against the assigner, or even the pledger of the goods. These cases do not, however, solve the difficulty presented by the record before us, where the pledger brings soit against a pledger for the value of the property pledged.

To the case of Bailey v. Solby, 34 B. N. 20, relied upon by appellant, it was held that in the great mass of ball ents the bailes has no assignable interest in the bailed property. In that case, however, the court said that there is a class of bail-ments where this ordinary rule does not apply, and where an assignment by the bailes of the property pledged would be enforced and pretested "as between the parties," and as mainet all percess whose interests are not injuriously affected by the transfer. "Of the cases which present themselves as falling within this class, would be the same of a pledge, or pass, where there is ordinarily pothing like personal confidence, and the contract is in no sense determinable at the pleasure of a party, but the bailes has an interest, or, as it sight he mid, a guard estate in the groat ill they shall be redecated."

This case acces to be in support of the contection made by counsel for appellant, except that we are makes to find in the desicion that the exception to the general rule was applied in a case involving a payn. The evidence in the present case shows that without appelles's connect appellant disposed of this visu to Elein, who removed it to a place different from that named in the

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receipt given to appollate.

In the same of Liller v. I would y. T Queen's Bench Division, sited by appolles, the court sold:

"The defendant was entracted with the goods for a particular purpose and to keep them in a particular place. took them to another place and must be responsible for what took place there. The only execution I see to this governly all to where the destruction of the government that all courses inevitably at one place as at the other."

Our attention has not been directed to any authority which directly decides the question under countieration, that is, in a case where a pleager had brought suit against a pleague; but we are inclined to believe that on grounds of sound public policy . in view of the special and possiliar character of the customes, a pays broker who receives goods to pledge shoul' not be par itted to transfor his liability to return the property to a third person without the pladeor's consent.

But whatever may be the rule at common law, it is our opinion that section is, charter lov A. page 2245. Euri's H. R. 1919, prohibited the appellant from transferring the appelles's property in such manner so to effect or limit her right to demand its return to her by appellant on payment of the amount borrowed with interest. This statute is as follows:

"And no personal property powed or pleded shall be sold or disposed of by any cush parabraker albin one year from the time then the pladger or passer shall make intendi-in the payment of the interest on the money so advanced by much parabroher, notes by the written against of soid purpor or pladgor, "

The statute provides that no personal property under pleign shall be sold "ar dismost of" by the gambroler wit in our year from the time a pleager shall make default unless by the placing a mitting country. He think this country untilicate to the facts of the present cose and that it prohibited appointment from transferring his interest in the glad of property sixth the time fixed by the statute. The judgment of the Manie spal court is affineed.

Modurely and Satchett, 37., concur. ATTTEND.

155 - 87073

CALTUR JOHNSON, & Liner, by FAV I Johnson, his father and Fest Friend.

Defendant in Error.

TO.

GRONGE C. ORISE. Plaintiff in Epror. Erros Li

OF GOLD CARRY.

225 ____ 501

DELIVERED THE OFFICE OF THE COURT.

Valter Johnson, a miner, brought outs by his noxt friend against the defendant, Secree S. Grims. A declaration filed in the cause conslating of three counts charged in the first count thereof that the plaintiff on or about Cotober 18, 1918, was riding in an automobile in a vesterly direction on Culton houd; that defendant at the time our querating an automobile in a southerly direction on Allowakee arome; that by reason of the nerligance of defendant the actuabile in reign plaintiff and riding was atruck with great force and plaintiff thereby was periously injured. The sound count charged that at and just before the time of the accident defendant negligently operated his automobile at a high and excessive rate of speed and that he failed to give may signal or varning of its approach to Unkton Road. The third count alleges that the defendant without regard for the safety of plaintiff wantenly and wilfully ran his. defendant's, automobile into the vehicle in which plaintiff was riding, thoroby concing the injuries to plaintiff. A jury which tried the case returned a verdict in favor of plaintiff for the was of \$20,000. Judgment was entered on the verdict and the do-Tandam brings the case to this court for review.

The socident scourred Scieber 15, 1815, about three . o'clock in the afternoon of a bright, clear day. Plaintiff was

manufacture and the second second second of Control of the Con AND RESIDENCE OF THE RESIDENCE OF THE PARTY AND with a second particular per control of the control particular are the second of the second o and the second of the second o the company that are for the archest to the artist of the extension THE THE STATE OF THE SECOND SECTION SE and the second programmed the second contract of the second contract More than the second of the se AND DESCRIPTION OF THE SECOND STREET, see the fifth the William Research to a right for a purifical with mile (figures) is regard in patient queen quality ATT THE REST OF THE PARTY OF TH will not be a subject to the property of the same of the same STREET, ST. ST. SALL SALE SALES AND ADDRESS.

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at the time about ten yours of age. Oakton Hood and Wilwarkee avenue intersect at a point near the village of Hiles, which is cituated morthwest of the city of Chicago. Milwaukes evenue, a comment highway, runs northwest and bouthoust. Unstan Hoad is a gravel highway running cast and west. At and just before the accident the plaintiff was riding in the rear seat of a Pord automobile which was being driven by his adult brother. Reveral witnesses testified that the Ford our appreached dilwarkee avenue from the east going at a clow rate of apped; that as the car cross ed Hilwaukee avoug its agoud was further decreased. The ovidence tends to abov that defendant at the time of the notident was driving a large Mitchell exclaned our at a rate of speed which was estimated by plaintiff's withouses at from 35 to 60 miles an hour. One without testified that at the time of the collision defendant's our struck the automobile in witch plaintiff was riding. "like lightning", and there is abundance of evidence in the record which tends to prove that the defendant gave no warning of his approach to the intersection by bloring a horn or othersise, and that he did not change the speed of his our natil it simuck the automobile is which plaintiff was riding.

Defendant testified that as he approached the intersection he saw the Ford car when it was about 25 blocks from
Hilwaukee avenue; that when he, defendant, was about 25 feet from
Cakton Read he saw that the Ford car was not going to etap and
he then applied his brakes; that at the time of the collision
defendant's car was going at the rate of ten or twelve miles an
hour; that when the Ford car approached hilwaukee avenue it "was
going at the regular speed," and that its speed increased when
it arrived at Hilwaukee avenue; that the Ford car before it
reached Hilwaukee avenue was noving at about 30 to 35 miles an
hour. The testimony of defendant indicates that the care calibra

and the party of t as a second distribution of the State Stat and had seen about the seen operated by the the second state in the same property artists are placed at the same of the sa the state of the color of the c appreciation of the property of the state of to the second se The last tree and print the same of the sa men of the same and the same all through extraction and the many to the second of the seco many to the a six to be because the soul a printing saw and the second of the second problems of the second of and the second of the second o (1) a life in office one of the part of the first of t manufacture of manufacture of the property of the same of the contract of th and send a particular of accommodal and all Albertons and Tal Statement the second of the court of the second of the party of and the second of the second s er a company of the second and the s

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with great force. He stated that after the collision he had turned his vehicle into a ditch; that it was beaded couthrost when it stopped with its rear end in the ditch about five feet from the cement roudway.

On cross examination defondant testified that he did not sound any hore, signal or warning, of his approach to the intersection; that when he first sow the Ford car he, defendant, was running at the rate of 22 or 23 miles as how; that he was not 30 feet away from the crossing when he saw the Ford car drive onto the Eilwankee are not pavesent; that he could stop his car when going at the rate of twelve or fifteen miles an hour within fifteen or twenty feet.

Certain evidence tends to prove that after the scallinian the defendant's par run a distance of about 150 feet and that is driving this distance it had run off the highway and had stopped with its rear wheels in a ditch.

At the time of the accident plaintiff and his father were occupying the rear seat in the ford untamphile on plaintiff's brother was sitting in the front seat operating the car. All of the three occupants of the ear civilit to have required injuries.

car at the time and just before the collision was running at a high rate of speed. Fire or six witnesses testified for the plaintiff and their testimony seems to be contradicted by only two vitaesses for lefandant, one of show, schmidt, stated, "Grine's car, I think, was going about 25 to 30 miles as hour. *** I new so shocking of his speed up to the time of the clash," So also, with reference to the speed of the car in which plaintiff was riding, the proventer nee of the evidence shows that it was proceeding on to Milwaukee aroms at a moderate or even a slee rate of speed just before the accident.

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was in the energies of epilinary care for his own safety. It is quite true that a child ten years of age may under certain circumstances be held quilty of contributory negligence. There is, however, in the record before us not a particle of evidence which would tend to charge plaintiff with any negligence abstractor. His youth was a matter to be considered by the jury. He was meated with his father in the rear tend of the car; he had no authority to control the conduct of its driver. Whether a failure on his part to look for defendant's approaching ear would constitute such hack of care as would proclude a recovery in his favor was a question which was properly submitted to the jury, and the evidence is amply sufficient to support a finding that he was entirely free from any negligence which contributed to any the the accident.

It is upported that a special finding of the Jury that defendant wantonly and viltally ran ble automobile into the automobile in which picintiff was riding, was against the weight of the evidence. This question, under the evidence, was also one for the jury. Mearly all the witnesses, five or six in minber, who actually ear the accident, tootified that defendant was operating his autocobile at a dangerously high rate of accod and this tostimony is supported by the position and condition of both care immediately after the becaming of the sections. Opstation of an automobile upon a marrow public algority (bilenakee arome As only 30 feet in with) at such a high rate of speed tends to show an utter disregard of the rights and safety of other persons levilly using the blowney, and under the circumetances above by the evidence we think the jury was variated in soncluding that the defendant was consciously gailty of wilful and wanton wondoot and that he must have had knowledge of

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the dangers consequent upon the manner in which he operated his car. Remier v. I. J. R. A. Co., The III., 465. The special vardiet of the jury finding the defendant guilty of vilful and wanton negligence was not against the weight of the systemas.

It is said that the trial court erred in giving the special interrogatory following to the jury:

"Did the defendant wantonly and wilfully run his auto oblic into and a time the automorphe in which the plaintiff was riding at the time and all and to plaintiff's declaration?"

The jury returned the answer "you" to this interregulary. It is urged that the interregulary newspec that itfordant ran his automobile into the vehicle in which plaintiff was riding, and that "an a close case then the facts" the interrogatory should be free from this accomption. There are asyonal sufficient answers to this contention. First, we do not regard the ease as a close one upon the facts. Becomd, the de-Tendant requested the court to sive a wimilar isotraction which requested the jury to answer the interrogatory "Yes" or "No". in accordance with the propositorance of the evidence: (the deresdant's tendered instruction was refused by the court for the reason that it was a duplicate of one tendered by the plaintiff. And, toird, is for no other resson, the point/osmoot be considered because it was not included in an unvered by a written matter for a new trial made in the cause, nor by any accimment of error in this court.

Whether defendant was guilty of wanton and wilful conduct, as charged in the declaration, was properly submitted to the jury. A decided prependerance of the evidence usees to support the answer of the jury to the special interrogatory. The passion, then, of plaintiff's contributory negligence is not material.

It is our opinion that the evidence shows that defendant's automobile did run into and callide with the automobile The same and the s

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in which plaintiff was riding. This in other sirometances the instruction might not be held good, we think, in the present case it as not error to sobmit the interrogatory to the jury. Maldren Express Co. v. Kurg. 301 111. 475; Meldenreich v. Frenner Bros.. 260 Ili. 440; Linchen v. Earten, 221 Ill. App. 70.

Complaint is made that the court refused an instruction which told the jury that under the first two counts of the declaration a resovery could be had only for "actual dranges or such demogra as will make good the cotual loss metrined" and that under those two counts exemplary or vindictive damages could not be awarded. The instruction so draws appears to be companded faulty. It does not direct the attention of the jury to much damages as the evidence tended to show was sustained as a result of the injuries. It told the jury that under the first two counts of the declaration only such damages might be recovered as would make good the actual loss sustained by pisintiff. The sury might well believe that this statement of the law would exclude recovery for pain and suffering sustained as a result of the injuries and also other demagns which could not technically be regarded as within the meeting of the term "actual lose." To do not think serious error was committed by the refusel to give claimtiff's tendered instruction number four. It stated an abtract proposition, house its refusal was not error. Manks v. C. Tys. Co., 208 Ill. App. 194. We think that for other reasons it was not applicable to the present ase. The undispated evidence shows that the car is which laintiff was riding was, with full knowledge on the part of the defendant, approaching Milesukee avenue. Defendant at the time one driving his car at a high rate of speed. The jury found defendant's concust was wilful and winton and it is our opinion that under the siroumstances, as shown by the evidence, the instruction would have tended to mislead the jury with reference to the duty the law imposed upon

and the sales of the County of the County State and Add Sales and Add Sa by company depoted on the half or follow precising a high-station man Then Printed and Printed all Your more Print to without these being common principal to a suppose of good and raised failed from Calculated by the contract of the contract of the contract of the MARCHARD ON TO RECORD THE PARCET AND THE PARCET. PRINTED IN COLUMN TO THE RESIDENCE ASSESSMENT AND ASSESSMENT the second of th Married according to both angent from all the contract of the rapid year our annihilation or complete and from any way when Comment of the contract of the NOT THE OWNER, NOT TO LABOUR BUT THE PARTY OF THE PARTY O Markey . The first of the light Constitution of the first of th por the time to the first transfer to the transfer to And the second of the second o This state is provided by production than the contract of the contract o THE STREET CAMES TO SEE SEE SEE SHEET STREET The transfer of the contract o enter de la companya The transfer of the analysis o il IV

the defendant.

It is argued that the judgment is excessive, although it is edmitted that plaintif an etained severe injuries so a result of the accident. The defoument was found guilty of wilful and wasten misconduct and the jury were permitted to edu to ear setual demages sustained by plaintiff a further our by ear of vindictive or exemplary demages. We are inclined to the view, however, that even if the judgment be reported as compensatory, it is not so large as to indicate that the fury were seawed by passion or prejudice. The car in which plaintiff was riding was struck with such great force that it was thrown into a ditch running porallel to the readery and plaintiff was thereby thrown from the our and agringt a sign-post, which certain witheress any a took about 25 feet away from the ro-dway; he was found in the adjoining field. blessing profusely; a sliver of sood driven through his for was entracted. One of defendant's situates testified " a picked up the boy and Er. Churan took his flager and picked the teeth out of his mouth." Flaintif was tained ovrious disfiguring house injuries; his leg was broken in at least two places; he sustained a freeture of the becomes and remained in a hospital for four or live months after the accident; several operations were performed on his leg and few. Flaintiff testified that as result of the accident he lest nine touth and that his lower lip was term open. I inclor to tifying about the he had the plaintiff during the first mek in February, 1919, being 3 or smonths after the accident occurred; that at this time plaintiff had an open yound upon his thigh which showed that his leg had been quartes upon; that at this time the knee-joint mea stiff. The evidence shows that plaintiff sustained severs and permanent injuries as result of the accident; one limb is semewhat shorter than the other and the knee joint is stiff. We are not ready to asy that the evidence shows, as urged by councel for defendant, that the not result of

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Company of the second of the s and the second s the second secon THE RESIDENCE OF THE PARTY OF T The later of the l the benefits the party of the p and the second s being as the lateral of the sale and the sale of the speed manufactured by the part of the below to THE PERSON NAMED IN COLUMN TWO IS NOT the first country and country to the country of the The second secon the first test that the property of the party and the part Broke, we could a cite a property and reference THE PROPERTY OF SECURIOR SECUR the contract the contract of t The second to a design of the particular of the second of THE WORLD STORY OF THE PARTY OF and the state of t In the second se ent to the second of the control of Market and the second of the s and the site of the first of the second of the second and it is the contract of the

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the accident to plaintiff is the stiffening of the left know-cap and the abortening of the left leg. There is evidence to the effect that as a result of the injuries sustained plaintiff's leg became infected and that it has developed a bone decay, causing an open sound upon the leg which discharges blood, pue, and some decayed bone. A surgeon testified that necrosis, a dying condition of the bone, had developed is plaintiff's leg and that as late as march 35, 1911, he, the witness, had taken a piece of bone about "one inch long and one-half inch side" from the wound on plaintiff's leg. Plaintiff's face was disfigured as a result of the accident. Under all the evidence we are not proposed to say that the vardiet of the jury is to large as to indicate pession or prejudice on behalf of the jury.

The judgment of the Circuit Court is affirmed.

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EcSurely and Matchett, JJ., concur.

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AND AND ADDRESS OF THE PERSON NAMED IN

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ARRESTRONG PAINT & VARIABLE DEAD, a Corporation.

Appollue,

VO.

CONTINUETAL CAN CO., a Corporation,

APPAAL FROM MENTCIPAL COUNT OF CHICAGO.

225 I.A. 650

MR. JUSTICE REQUISITY DELIVERED THE OPINION OF THE COURT.

This is a suit wherein, upon trial by the court, plaintiff had judgment for \$4310.75 for Jumges claimed because of the alleged breach by defendant of its contract to famight plaintiff with cans as required by plaintiff.

and judgment of all capiet was satured here, spinion in volume INO til. App. 90. Upon appeal to the impress court the judgment of the Appellate court was reversed on the ground that this court had based its judgment on an erroneous view of the law with respect to one branch of the case, and it was recented with directions to sensider and pass uson "moritorious questions properly raised by assignments of error," and which had not been passed upon by us.
301 Ill. 103. The salient facts and issues are stated in these opinions.

Among the points ausigned as error by defendant was that the contract called for only the mustor of cans or sackages needed by plaintiff for actual use in its business usion to April 1, 1917, and that the evidence did not show any failure or refusal by defendant to deliver to plaintiff such cans. We held that the point is well taken.

The Supreme court construed the contract, saying:

"As we view the language used in this contract, it clearly means that the paint company unconditionally obliquied itself to buy a minimum of 32000 worth of tim packages from the can company and that it was given the privilege or option of buying more packages if required for actual use in its business. It was

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not elligated to buy more packages unless it chose to do so, but if it exercised the option to buy core, the can company bound itself to furnish all the pushages ordered, so long as they were moded for actual use in the paint company's business before April 1, 1917.*

The evidence tends to show a rise in price of came and that plaintiff ordered more than one setually needed for use in its business, for the purpose of disposing of them on the market at a profit. The opinion of the Deprese court comments on this as follows:

"The can company filled orders under this contract until it suspected the mint company was ordering beyond its actual needs, and for that reason refused to ship may more washings at the prices quoted in the contract. Considerable correspondence was admitted without objection. February 12, 1917, the can so pany wrote the paint company, that it recognised the right of the paint company to arder all the cans it needed for actual use is its business up to April 1, 1917, but that it did not consider that the paint company had a right to order packages beyond its actual needs, for the purpose of storage. It called attention to the fact that the paint corpany had on hand 134 crates which it was required to amply and return to the can company, and that this indicated that it was not using the cans which had been delivered to it. To this letter the paint company replied february 14, decying that it was storing up packages or that it was carrying any larger stock than usual. It stated that its increase in orders was due to an umanal increase in business. In this letter it elates: contract with you walls for an unlinited amount of cans, and, as you very well know and must appreciate, we could legally send you orders for enough case to cover our entire 1917 requirements and you would have to deliver them, and if we don't do this we are possing up on opportunity to make \$15,000 or more, which I don't see any good reseen for doing. ' In a letter dated Pebruary 28 the paint company said, and other things: 'It is also our privilege to order out an unlimited quantity of case on our present contract, and this we propose to do, and will forward you other orders in the course of a few days which we shall certainly insist on your selivering. In reply to this latter the own company wrote March 5: 'In one of your letters you suggest that you could sent us orders for your entire 1917 requirements, and in another letter you advise that you intend to order out a very large quantity of came. We have to differ with you, for we are only entitled to sell you the quentity of cans which would be for actual use in your business prior to April 1, and only then upon reasonable delivery notice. '*

On the trial an attempt was made by plaintiff to

show that came ordered by it, the delivery of which had been refused by defendant, were needed for actual use in its husliness, The state of the s

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by acking a vitness his opinion as to this. Due testiony called only for conclusions and spinions and was incompetent. There was decomentary evidence with reference to plaintiff's gross sales of paint and varnish without any reference to whether these were packed in case or not. It appears that a large assent of its products was delivered in barrols. There was an entire failure of any co-petent evidence proving that the kind and size of case called for by the contract which defendant refused to deliver were moded for actual use in plaintiff's hadress before april 1, 1917. So far as the recent above, the assent at case delivered was more than sufficient for plaintiff's needs.

The failure of plaintiff's evidence in this respect amounts to a failure to prove that defendant breached its contract as alleged, and under such direcestances plaintiff was not untitled to damages, and the judgment of the Handeigal court will be reversed with a finding of facts.

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Dayer, P. J., and Matchett, J., concur.

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FIRTHING OF PACTS.

To find an ultimate facts that defendant did not fail or refuse to furnish any come or puckages to plaintiff, under the contract in question, needed for extual use in plaintiff's cusiness before April 1, 1817, and that defendant did not broad its contract as alleged in plaintiff's statement of claim.

The second secon THE RESERVE OF THE PERSON NAMED IN COLUMN TWO AND THE PERSON NAMED IN COLUMN TO A PERS and the same of th The second secon

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COMPANY, a Corporation.

APPEAR FROM CLASULY COUNT OF COOK COUNTY.

Min. Justice modulely delivered the crimital of the other.

Plaintiff's brought onit as beneficiaries of two policies of life insurance issued by defendant on the life of Livin J. Girlord, and upon trial had a favorable vertical upon rulah Judgment for \$4.40% was entered, from which defendant appeals.

Defendant asserts that the insured in his application knowingly made folce answers to questions material to the risk, which was such a fraud as to void the policy issued on the faith of such representations. These questions and answers were said to be as follows:

"El-a. Have you had any clokecen in the last five years? If so, state what and when, and give the mane and residence of attending physician?" Answer, "No." "33. Have you ever had any disease of the following named ergans or any of the following named diseases or symptoms?" Then followed the names of about fifty-eight diseases, symptoms and organs of the human bedy, in-cluding the heart. The answer given by the applicant was "No."

It is claimed that these answers were false; that the evidence shows the insured had heart disease at the time these answers were unde; that he was aware of the fact and had been treated for heart trouble for a year or two before that time. The applications were made and the policies issued in Pohrusry, 1911, and in each policy it was provided that it should be incontestable

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 after two years from its date sument for frond. The insured Stad in December, 1918.

Was it preven that the insured knowingly and fraudu-Lently made minrepresentations us to the sendition of his heart? In the proof of death Mary Gifford, one of the claimants, stated that the insured had had heart trouble "the past year or two;" that the consulting physician was Dr. Neym, and that the name of the insured a death was "cortic insufficiency - heart Fallure." Dr. Hays testified that he and tranted the insured for about treaty years prior to his death for "general nervousness;" that the lirect course of South was "acriic insufficiomry;" that he hid this disease "aines a few years;" that he never anew of decemend being treated for his heart, and that he had no record showing that he had treated the insured within five years prior to the date of the applications. Dr. Salinger, the examining physician for the insurance company, exactned the insured at the time of the applications and reported that the heart action was "univers, true and steady and the so ads and rythm regular and normal." and that he found "mothing abnormal to somittion of heart or stood" and that the functions of the "mervous system" were in a healthy state. It was also shown that in June, 1916, wwin Uliford and an application for montership in the bentral Dusiness on's Association, is which he stated that he had had "heart trouble 15 years." It also appears that the New York Life Insurance Company insued to him a policy of life insurance in 1905.

A special interrogatory was submitted to the jury as to whether differed at the time of making his application for insurance was "suffering from a disease of the heart." To this special interregatory the jury answered, "No."

The burden of proving the defence of fraud was upon defendant. Dillagets v. Julton, 136 III. Lin. In they fraud do.

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personal constraints become beautiful contraining \$1 and The state of the s MANAGEMENT OF STREET, There is no seen and the foreign the part he was been and better many the last two cases or any or taken and those and discount will find Committee of the contraction of the contract of the contract of position of the control of the control of the partition and will Annual Street and Stre with the first of the Spinish Street transformed amount to week more at root figures; set a pitalet the second second beauty to be to the last the proof salt will and in common an extension where each charge-depend on the party and the state of t the real extension has been all the Parket and Date Suppliers for small the cold time "greened him to be suffered will be able to the place of n in the early and it. If the at the second of the party of the same below the property of sell-Mary Adv. Support of America, printed that Code, Adv. St. Day, Cod. St. Mary A REAL PROPERTY AND ADDRESS OF THE PARTY AND A mile of the bearing in the police

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 fendant out prove that the insured at the time of his applications know he was suffering from heart disease; that he knowledly represented to the centrary for the purpose of having them acted upon by defendant, which relied thereon to its injury.

the jury properly could find that there was not sufficient evidence, if any, to prove that the insured either had beart disease or knee the pathological facts concerning his heart when he made the applications. East people are unable to determine for themselves as to the condition of the heart and many functional disturbances are frequently attributed to the heart which arise from einer seases. The insured's physician, Dr. Heye, testifying on botalf of defendant, his not state definitely that differ was suffering from heart disease at the time of his applications, or had been treated by im for such a disease within five years prior thereto. Defendant's contral with no evidence of disease.

Under such circumstances the jury properly could conclude that any statement by different to his heart could not have been falcely made for the surpose of misleading defectant, which acted thereon to its injury. The defence of francheving failed, the verdict properly followed, and the judgment in affirmed.

APPLICATION.

Dever, P. J., and Matchett, J., concur.

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CLAUS A. CARLSON,

Appellee.

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BENJAMIN WELLER.

Appellant

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

225 I.A. 6501

MR. JUUTIUM MOSURALY DELIVERED THE OPINION OF THE COURT.

Plaintiff obtained judgment for \$350 upon power to confess judgment for rent contained in a written lease between the parties. Defendant petitioned the court to vacate this judgment which motion was denied, and from this order of denial, defendant appeals.

Defendant's petition and affidavit ascert that he had some decorating done in the leased apartment for which he paid the decorator, and he claims he is entitled to set off the amount paid against plaintiff's claim for rent.

It has been held many times that a judgment by confession on an instrument in writing will not be opened up for the purpose of permitting a plea of set-off. Forchsenius v. Canutson, 100 Ill. 82; Heas v. Heffron, 40 Ill. App. 652; Hochler v. Glaum, 169 Ill. App. 537; Levinson v. Pisser, 192 Ill. App. 60; Henefield v. Jtsuffer, 201 Ill. App. 123.

A motion to vacate a judgment entered by confession is addressed to the sound discretion of the trial court whose action in denying it will not be reversed unless it appears that the discretion has been abused. Alake v. State Bank of Freeport. 178 Ill. 182.

The order of the Numicipal Court is affirmed.

APPIREND.

Dever, F. J., and Matchett, J., concur.

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27199

J. J. NAMRINGTON & Co., Agent for cetate of R. W. MUNTER,

Appelled.

VB.

JAMES O. KOONTZ.

Appellant.

APPEAL PROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE MEDURALY DALIVERRO THE OFFULOR OF THE COURT.

This is an appeal by defendent from a judgment against him in an action of forcible detainer. Defendant's brief precents a number of points which do not seem to be portinent but rather tend to obscure the simple questions in issue.

Plaintiff proceeded upon the theory that defendant was a tenent from month to menth and Warch 39, 1921, served metice that the tenancy would terminate on April 30th, fallewing.

Befordant asserts a tenency from year to year pursuant to a verbal agreement for a term of three years. Buch a verbal agreement is obviously void under the Statute of Frauds.

Plaintiff proved a tenency from month to month not only by oral testimony, but by the receitals in the receipts given when the rent was paid.

We see no reason to disturb the judgment, and it is affirmed.

AFFIRMED.

Dever. P. J., and Matchett, J., concur.

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PRINCE N. BERNEY.

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27212

JOHN GRANDY.

Appellee.

VS.

RELIABLE STORE FIXTURE COMPANY a corporation. appellant.

APPRAL FROM MUNICIPAL COURT OF CHICAGO.

225 I.A. 65 11

MR. JUDICE BOURELY LOLLY STUD THE OPINION OF THE COURT.

Plaintiff brought suit for the balance claimed to be due for commissions arising out of a sale by defendant of certain store fixtures through the assistance of plaintiff, and upon trial by the court had judgment for \$197.50.

The evidence tends to show that plaintiff is a manufacturer of ice creem in devanuah, Illinois, where he had a customer, a Mr. Pailey, who wished to buy some fixtures for his place of business, and plaintiff recommended and sent him to defendant in Chic.go to secure prices and terms. Wailey thereupon called upon defendant and upon a second visit left his order for fixtures amounting to 13,975. Plaintiff also culied upon defendant on the same day and was informed by Mr. Spitzer, defendant's president, as to the sale to Bailey. Mr. -pitzer also instructed the book-keeper to give plaintiff a letter offering to pay ten per cent commissions on sales of fixtures made on orders or to customers sent by him to defendant. This letter specifically referred to the sale to Tailey. Plaintiff at the same time gave Wr. Opitzer information as to Bailey's place of business and made rough drawings as to how the fixtures were to be placed. : ubsequently defendant paid plaintiff \$100 on account of commissions on the Bailey cale and the evidence tends to show that it promised many times thereafter to pay the balance.

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The only point made in defendant's brief in this court is that the evidence shows plaintiff was carrying on a broker's business without a license as required by the Numicipal Code of Chicage. This court can not take judicial notice of the provisions of the Numicipal Code of Chicage, and so they are not incorporated in the bill of exceptions or record before us. we cannot determine as to any violation of the same. <u>City of Chicago</u> v. Cullen, 191 Ill. App. 97; <u>City v. Noonan</u>, 204 Ill. App. 195.

It may also be noted that plaintiff is a resident of, and does business in Savannah. Illinois, and therefore would not come under any ordinance of Chicago requiring a broker's license. It also appears that defendant is not a broker but a manufacturer.

Plaintiff suggests that this appeal was presented solely for delay and requests that statutory damages be imposed. We are of the opinion that the resord justifies this and the judgment is therefore affirmed with statutory damages against defendant of ten per cent. or \$19.70.

AFFIRERD WITH STATUTORY DAMAGES.

Daver, F. J., and Matchett, J., concur.

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225.I.A. 651²

TRAVEL

MR. JUDICAL MAGNITURY DELIVERS OF THE COURT.

Plaintiff brought out to recover \$500 earnest nousy paid as a deposit to defendants, real outsto brokers, on account of the purchase price of certain real outsto, and upon trial had a verdict for \$500, upon which judgment was entered, from which defendants upons.

As there must be another trial we shall refer only briefly to the ovidence.

Defendants represented the events of certain property in Chicago. Ers. Sayward, one of the owners, lived in New York City, and the other owner, a Mrs. Commute, lived in France. On or about August 19, 1800, plaintiff commons amoutations with defendants for the purchase of the previous and signed a form of contrast usually used by the chlose and leave board and live defendants \$600 as asymest names, which was to be forfeited is the purchaser failed to perform the contract promptly on his part. The price was \$20,000, which was "subject to the owners" approval." Defundants con mulcated with the avence, but commontly there was smoo slavness in obtaining their consect to this price. Wib defendant limites suggested formarding a deed to the owners for their eignatures. The form of the deed was submitted to plaintiff's attorney and approved. Subsequently defendants received the execut of the events by letter and by cable, and defendants thereupon signed the contract for thom. Later plaintiff's attorney was informed

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that the dood had returned and the deal sould be closed. There seems to have been some folay pursuant to the remark of simintiff's attorney, made on Neverber 19th. for further time to execte the abstract. Some question was raised an to the marchantability of the abstract furnished by defendance, but ansurance was given that this would be sered, and soverbor 18th claintiry and his atternay sat defordant Buston at defendants' office to close the cule. There was some discussios no to insurance and rents, and sther metters ween which the parties altimately acreed. Asse difficulty arese with reference to an affidants as to sechesion! Licon. Flaintiff's attorney also used for assurance by oable or otherwise as to Mrs. Cauchois being alive at the time of the delivery of the deed, but defendants and they could not, in such a short time, obtain the secondry data to natialy plaintiffs objections, there seems to have been a test time aprecuent that the carbine or as the feet would be placed in esprew until those requests could be not. Finistiff's attorney tregular distated an easyw approver, which is part road as fullows:

"In the event that said obstruct disclose to i the grantous in said deed have made no other conveyance of anid presenty in description of their deed to louis Cobinberg if there are no judy-ments against these or socialists in property, then such same is to be held by the understruct, leaberger a Company, until such objections are recoved."

Defendants refused to sign this on the ground that it was reduced less, which objective was obviously good. Thereupon claimtiff's attorney declared the deal off. The following day confedent Duston telephoned to plaintiff's ritorney and afform to proceed with the deal, using the Chicago Title and trust impost so becare agent, and this proposal was positived by a feater, but these effers were inclined by plaintiff's attorney and down the current for return of the express memory.

Plaintiff's ocursel argues that there was no contract

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for the reason that it was algred in the first instance by the plaintiff only, and therefore was merely as offer by his. This may be true, but it was an offer made subject to the operaval of the owners, which was subsequently obtained, and view the americal was expected by their duly autiorized agents, which defendants were, the offer ripened into a contrast.

The case was very close upon the facts. We have the improvalen that if eleintit and his attorney had expectly visible to consummate the dual, it would have been placed.

Under the circumstances it was necessary that the jury should be accurately instructed. Among other instructions, the party gave on behalf of plaintiff mader 1, which is as follows:

"The court instructs the jury that the action brought by the plaintiff lies is every new core one person has received money that such installment that is equity and good emuciones he want not to retain sold coury, and if the jury finithes the deformable in equity may not conclude about not retain the deposit make by the electricit, then your vertical charles he for the plaintiff."

a kind of curbotone justice, suggesting that as plaintiff got nothing for his money it should be returned to his repartices of visiber or act his can estima prevents the sale. It was highly calculated to misisad the jury on the fundamental question as to who was responsible for the failure of the transaction. The giving of this improved was prejudicial error.

inetraction number 6 at defendants' result, when was in each mass that the authorized at the deed from Era. Enguard and Era. Cauchela constituted gring facing proof that they were living at the time of the schools according to the schools and trust it would be present as a matter of law, in the absence of proof to the centrary, that they were living when the deed was tendered to plaintiff and that they were living when the deed was tendered to plaintiff and that

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conceded that this instruction perrectly states the ine. C. A.A. In the Lo. V. Respond that ill. Tv. It would have been proper to give this instruction. While it is true that this preparation did not make it impreses for plaintist's attorney to is and desirate proof on that subject, yet the jury should be inferred as to the law so as to be able to pass upon the attitude and good faith of plaintist's attorney in making this decome as ging and non-

For the remons above indicated the judgment is re-

LIGHTED AND MENTARESD.

Baver, F. J., and Extensett, J., concur.

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JUNEAU TELEBOOK

Aires Made

WIN.

VICTOR JAHN,

Appellant.

OFFICE CHEST CHEST

225 I.A. 6513

MON. JUNTICE MANUFACTOR DELIVERED THE OPINION OF THE SCURT.

Plaintiff brought outt alleging personal injuries inflicted by defendant in negligently driving his estembile and in violation of a city ordinance, and upon trial had a verdict and judgment for \$3,000. Defendant appeals.

The accident happened at the server of Halsted, a north and south street, and Willow, an east and west street, in Chicago. Plaintiff, going to his place of business in the morning, approached a scuth-bound Halsted street part to beard it, and was struck by an automobile owned and operated by defendant.

to the occurrence, the jury preperly could believe that plaintiff walked from his home, which was west of haloted street, to the northwest corner of Maleted and Willow. He there steed on the widewalk waiting for a south-b and street car. As it approached it came to a step and plaintiff stopped off the sidewalk and into the street, walking towards the street car. Then he was about opposite the center of the street car defendant's automobile came from behind it, running close to it. Flaintiff attempted to avoid being struck by the automobile but did not succeed.

Defendant's negligent driving samed the accident.

His attempt to pass the etreet car which was stepped for the purpose of taking on passengers was a violation of the ordinance of the City of Chicago making it unlawful for a person inving a

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vehicle "upon the streets of the City of Chicago upon evertaking any street car which is stopped for the purpose of discharging or taking on a passenger or passengers to paralt or cause sold vehicle to pass or approach within ten (10) feet of said car as long as the said car is so stopped or remains standing for the purpose of discharging or taking on a passenger or passengers." (Section 2434 a, Article 5. Chapter LAXIII. Chicago Code. 1911.)

Defendant's theory was that he was driving ahead of the street car and that plaintiff proposed ever from the east side of the street. There was sufficient evidence to discredit this theory with the jury. The conductor of the street car said: "The automobile was behind me in the street car truck and was coming behind us when we stopped, and when we stopped the machine shidled around the corner of the car and went right along on the right-hand side of the car. When I was him he was coming pretty fact."

timony that plaintiff's head was fractured, the tengue term, the left leg injured and two of his ribs fractured. He was in the boshial for three wasts receiving transment, secretally with reservence to the injured head. He did not return to work for some ten weeks after the accident, and testified that he still suffered pains in his head. Defendant introduced no testimony of any physician tending to question the extent of plaintiff's injuries.

The verdict is not contrary to the weight of the evidence nor are the damages exceedive. No other points are presented in the brief, and the judgment is affirmed.

APPITRIE ..

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296 - 27264

SIDENT MORRIS & Co. 2011.

Appellant,

TO.

AMERICAN VULCANIESD FIRMS GO., a Corporation.

APPUAL TROS SUBJUIDAL COURT OF CHICAGO.

225 I.A. 651

MR. JUSTICH BOTTHELY DELIVERED THE OPINION OF THE GOLDS.

Flaintiff brought suit claiming \$395 damages because of the failure of defendant to fulfill a contract whereby plaintiff purchased from defendant three gross Velvet business. Pefondant denied that it made may contract with plaintiff as alleged. Uses trial by the court there was a finite; against plaintiff and a judgment on the finding, from which it appeals.

The evidence tended to show that a sales agent for defendant on October 23, 1919, sade a written memorandom proposing to sell to plaintiff a number of Volvet basists which contained the words, "Order accepted by and delivery precised in two weeks, not-jost to price." This was signed by the agent. We hold that the trial court correctly construed this to men that the cale was subject to the approval and acceptance of the price by the agent's principal, the defeniant here. Defendant took no notion is the matter indicating any acceptance or approval either by shipping the goods of communicating in any way with plaintiff. After the expiration of the two seems plaintiff broacht suit for broach of the december and acceptance of a possession of the two seems plaintiff broacht suit for broach of the alleged centract.

There the price was subject to acceptance of the wonder, who takes no affirmative action thereon, is there a bidding contract between the parties?

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Plaintiff's counsel does not make the point in his brief claiming a contract between the parties, but presents only the question of damages. We know of no case where under such circumstances the more silence of the party to whom the proposal is made has been construed as an acceptance. Such a paper is morely an offer and does not become the input until it is accepted in some definite may by the party to whom acceptance is made subject. Vaucha v. Clater, 147 III. App. 441; Sheburgan facer 16. v. Svigart, 140 III. App. 314.

A contract of sale to be enforcible must be definite as to amount, price, terms of separat and time of delivery. <u>felf</u>
v. <u>felig.</u> 204 111. Apr. 178. Intendant's failure definitely to approve and accept the contract left it movely as unsuforcible order. There was therefore no contract upon which plaintiff tould accept a breach and consequent damages.

The judgment of the Municipal court is right and is affirmed.

AFFIRMED.

hever, P. J., and Matchett, J., concur.

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VIII.

MORRIS AND COUPANT & Cor-

APPEAR FROM SEPTEMBER COUNTY OF COSE COUNTY.

20 KTA 6515

in. Justice Bouldely malivered the opinion of the court.

Plaintiff, bringing out for componenties for personal injuries caused by the solitation between an automobile in which he was riding and a seter truck exact and operated by defendant, had a verdist and judgment for (1.760. Defendant appeals.

Thorn is no mulcinstial conflict in the evidence. The jury properly could find that the assident hapowed July 20, 1812. on South Anhland arome, a street running north and wouth, in Chicago. Street car tracks are in this street. The ancident happened about 2:30 o'chook in the afternoon, at a point about ball way between the Chicago river and Totaly-accord circut. Plaintiff was a guest in an autocobile driven by Peter Garnecki, which was ading aouth on Ashland ayonar botween the west street car track and the westerly mirb, at about fifteen alles an hour; the motor truck of defendant weighed about three and one-half tone, was looded, and going porth on the east olds of the street at about fifteen miles an hour. As they approached each other the truck of defendant was suddenly turned to the left directly across the path of the south bound touring par. Burnecht tried to stop his our and termed it towards the west ourb, but was struck by the motor truck and pushed onto the midewalk. There were none other vehicles on the north bound tracks ahead of the motor track. and apparently its sudden turn to the west into the puth of the south bound our was for the purpose of pussing this north bound

to the first proof the proof of the party of and the second s engin in the first transfer of the first tra the same and the same beautiful to place you part perfect all the first to the part of the perfect and the perfect to the perfect t and the second of the second o many series and the first series have been been an arrival and the term are considered that the state of the st traffic. There was no evidence that defendant's driver gave any varning or other indication that he intended to turn suidenly to the west. The neve was made so unempectedly that neither plaintiff ner Sarmechi would have any reasonable grounds for anticipating it. On the other hand, defendant's driver should have known that the maden turning of his truck towards the west was bound to page a pollision between it and Sarmechi's cir.

Under these circumstances the jury was justified in concluding that the cause of the accident was the negligant operation of the accident was the negligant operation of the car as alleged in the designation, will the plaintiff was free from any negligance contributing to the accident.

It is asserted that the damages mounded by the jury are exceptive. Plaintiff mustained severe bridges on his bed and shoulders. The violence of the collision was much us to render him unconscious. We was appointed to bed for two make with severe pains in his head and was under the cure of a physician for appreciately six menths. There was evidence that for almost two years after the registent is serious with recurring severe head-actor; the physician testified that trees were according by such injury to the brain causing becominges. We find no reasonable ground for helding that the vertical is too large.

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Dayer, P. J., and Saturett, J., concer.

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THE HATMES MOTOR WAR GOMPANY, a Corporation,

APPEAL FROM MUNICIPAL COURT OF CRICAGO.

225 I.A. 652

MR. JUSTICE BESUMELY DELIVERED THE OPINION OF THE COURT.

Plaistiff brought ouit, alleging that defendants agreed to deliver to plaintiff a Mayora autocolds in conditions. Lion of 1800 cash and an old autocolds in trade; that plaintiff paid the such and delivered the elementary outle, but defendant refraced to deliver the new autocolds; that plaintiff was entitled old to recover the 1810 paid out the value of instant obtie, said to be \$1,000. On trial by the court judgment was entered against defendant for \$000, from which it appeals.

bill of enceptions from the record; this larger action, has stricted the court only the statutory record, and only two of the acalgoments of error are relevant. Masher 3 is that the trial court errod in rendering judgment contrary to the law, and number 8, that the trial court errod in rendering judgment contrary to the law and the weight of the evidence in this case.

The bill of exceptions having been stricken, this court can consider only those assignments of error touching the statutory record. Allega binotyping to. v. Mania, ED 111. App. 200.

The two assignments of error based upon the statutory record are not argued in the brief of appellant; they must therefore be considered valved. <u>Eurostey Sc.</u> v. <u>Industrial lagrit</u>, 202 lil.

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Where the record contains no till of conceptions and it is not sixen that there is error upon the record, the judgment will be affirmed. Related v. Bell, 180 III. 263.

For the remons above indicated the judgment in af-

AFFIRMED.

Dever, P. J., and Matchett, J., concur.

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CARD PERCE.

ALDO LAME

VB.

Gorporation, August Charles.

APPEAR SHOW MUNICIPAR COURT

VOLTA 8512

HA. THE OF MESTARIA BULLYANDE FOR OFFICE OF THE COURT.

Carl Parsen recovered a judgment against Joseph Madelowall for 1321.17, (nerselfer cards) nort was being autust 6. Ernyapvari and the diegor devine and the common and the commons was refurned as having lace carved on John, largest 1 amound. answered, and was discharged. Conditional Judgment was ortored accinet the Hinger Sewing Learner Successy and solve forting was issued and returned as served and the conditional judgment was wade final. Here than thirty days thereafter this company entered its appearance and outs application to get anide the factors and to discharge the gardisher on the armusi that it had never been norved with momens and that it seed Hariejeveki nothing. This application was treated by the sourt as a petiting in the nature of a bill in equity as provided in Section 31 of the Manteipal Court act, and Person was given loave to file an aumor and counter affiduvits. Upon consideration the court not noide the order making judgment final and disclarged the garnienes.

The record is acceptate confusing as to the appeal.

Apparently there were two orders allowing "an appeal of this cause."

An appeal is from a final judgment order or decree of the trial court. We know of no proper practice of appealing "a cause."

It was presented to the court that the service of the garmishes success was ordered by plaintiff's attorney to be

Company, and the return was accordingly ands. It appears, however, that this can was not the agent of the company. He has a store of his own at 1800 West 18th street in Chicago, where he carries on the malarus of solling shoongrades and assist manipus. When he sells a sowing machine he gets a considerion. The Singer Seving machine that there were my contractual relations between the semany and Preparent. The uncomy is a fareign surmeration and her an agent at held Fest Festers indirectly at the also shown that there were upwards of fifty eteres in Chicago leased and aming carries as a semication hasis who were not employed at its Singer Sewing Raghine Company.

The statute in regard to service, chapter 110, section 0, provides that if the president cannot be found in the
sounty in which sait is brought, a copy of process may be left with
"any clark, socretary, superintendent, peneral agent, causiar,
principal, director, engineer, conductor, station agent or my
other agent of said economy" found in the county.

It has been held in constraing this statute that san agest is a person employed by another to ust for him, some that

For the parado of priving under only needless of the states such agent and to one occupality a pointed by the proporation and representing the corporation in cose line of ospication and arrival by increase authorised by its diversity to the internation of the plication or construction and contrary to the internation of the parties. Samuel v. S. & F. K. Traction Sp., 274 ill. 181.

A.S. Co. v. Febra. 219 111. 578. It has also been held that the return of the builter is not conclusive of the fact that the person served was the agent of the defendant and that the nore solicitation of business by persons having no other authority is not doing

State of Laboratory & Add Transport

 omeiness in this state. Door v. leads | Acidia 12. Co., "50 Ill.

Cases like Charach ". North American Insurance Cu...

The politica to vacate the judgment and to release the jarniches was edurated to the equitable discretion of the trial court. The facts presented fully justified its orders, and they are affirmed.

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Dever. P. J., and Matchett, J., dendur.

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CYTY OF CHICAGO, a Municipal Corporation,

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APPEAL THOM SEPTEMBER COUNTY OF

225 I.A. 6523

ER, JUSTICE BESUEELY DELIVERED THE OPINION OF THE COURT.

flaintiff, bringing suit for compensation for personal injuries alleged to have been enumed by the negligenes of defendant respecting one of its pidewalks, had a verdict for \$3,500, and from the judgment thereon defendant appeals.

The only points presented as grounds for reversal are the alleged contributory negligence of plaintiff and the plained expectiveness of the verdict.

Plaintiff received her injuries from stepping inte a hele at the southoust corner of Clark and Admie streets in Chiange. At that corner the outer edge of the sidewalk is on a curve and the aldemain is about on a level with the street permont. The bule was about three and amenalf feet long, about sight or size inches wide, and about three or four trained deep; it was on the curve, must of it on the Clark street aids; it had been there for some time prior to the accident, and there was evidence that other people had tripped over it. There is a great deal of traffic at this corner both on the otroot and chievalks. On the merning of the day of the accident it had rained heavily and the depressions to streets and sinewalks were tilled ofth after. hole was filled with muddy water which tended to conceal it. Plaintiff had never passed ever this sidesalk before this day and had no knowledge of the existence of the nois. The was walking west on Adams street and as she appreached the corner, looked to

con which way the traffic was going, and no it was open from east to west she continued to walk west. The glaced downword hat on account of the middy water in the tole some motern, to distinuish its depth from other publics in the street. As her sight cont some drep it went madealy into the help, throwing her was her right foot doubled under her.

a. Anty upon the redestries when using a public atrect to estate pate negligence on the part of the City; that while he cant use reasonable save for his one safety, he has a sight to assume that the City has exercised ordinary care to heep the streets in an extinarily safe condition for present using and a degree of care, and that such podestrian to not absolutely tound constantly to fix his eyes on the midewalks to search for possible rules. You's v. City, 198 til. 198; Jily v. Engage, 143 til. 355; Lyring v.

The question whether the plaintiff was in the exercise of due care at the time of the accident was properly submitted to the fury, and we are another to any true unfor the directions as above related, the furerable vertical for plaintiff was against the weight of the evidence.

Plaintiff stapped into the hole in much a manner as to stretch the tendons supporting the arch of her right foot. At the time of the accident also was twenty-nine years old and prior thereto had been in good health, with no treable from her fact or ankles, and was in the habit of welking a great deal and dancting frequently. She has not been able to dance since the accident and cannot walk without pain; at times a sharp pain strikes her suddenly and she has to support herealf to avoid failing. For account days after the accident she were a boot strap bandage and

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been compelled to buy special shees. Defore the accident she was complayed as a clerk and also conducted a business in the evening of selling men's shirts and pockties by calling at the loces of her customers. Since the mediant she has not been able to carry on this business, which has occasioned a loss to her of about 1900 a year. It is correctly argued that the verdict is no large as to indicate that the jury was influenced by possion and projudice. It may be that sitting as jurors we would not have assured as large an amount, but we cannot say that it is as exceeding as to vitiate the vertict. As injury to the fact which permanently impairs its use is not a light injury; it is a carious handlesp to one's sificiousy and enjoyment. To do not feel that the apount awarded is so large that we should be justified in accepting to change it.

The judgment is affirmed.

AFFIDUID.

Dever, F. J., and Matchett, J., concur.

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VIII.

D. A. GCHULTS, Inc.

APPEAL FROM CIRCUIT COURT OF GOOK COUNTY.

225 I.A. 652

MR. JUSTICE MCCHULY DELIVERED THE OFICEN OF THE GOVER.

By this appeal defendant scale the reversal of a judgment for \$2,500 upon verdict in an action for damages for alleged malicious prosecution of plaintiff, and accent and buttery committed on him by defendant.

and had reliciously and eithout reasonable and probable same charged plaintiff with ember-levent of three latters; that his arrest had been caused and that he was imprisoned and kept in jail for six hours, was subsequently tried and found not guilty. In other counts it was alleged that the defendant through its agents assumed and boat the plaintiff to his injury. Upon trial the court instructed the jury to find the defendant not guilty upon the assemble and denied the otion to instruct the jury to find defendant not callty on the malicious procession counts, which were submitted to the jury with a verdict favorable to plaintiff.

Defendant contends that the court should have instructed for defendant as to the malicious prosecution operate, and plaintiff assigns cross errors upon the action of the court in instructing for defendant as to the assemble counts. We held that both these points are well taken; that the court should have instructed the jury to find the defendant not guilty as to the malicious prosecution counts, and should have submitted the issues made by the assemble counts to be determined by the jury.

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Appendix and found four and additionable access

The record shows that defendant operates a number of cigar stores and that in June, 1916, plaintiff was employed by it as a clork in its cigar store at Madison and Clark stracts in Chicago. An employe named Farasch was in charge of this store. Towards the latter part of october, 1910, Parasek our the plaintiff ring up a sale on the cash register for a less amount than the actual amount of the sale. He commandated this to Mr. Yeiger, vice-president and outsier of defendant's lustress in thickes; thereupen, through must be called defendant's service department, a weigh was kept on plaintiff to assertain whether ar not be was ringing up the each register for all the sales ande by him and for the proper essents. The of the employee in this department, Delancy, asw certain sales by plaintiff, she did not register them, and the register tape did not above them. A report of this was made to Feiger. On the following might shiptiff was observed again to sait to ring up certain sales and by him, and the register tape does not show these sales. A report of this incident was also made to Felier. On that everlas slaintiff was ordered to go into the busement of the store, where he was confronted by Mr. Feiger and a Mr. Haman and charges with asbesslement. Hamman was at that time copleyed by defendant and was exposting shortly to succoud ir. Feiger as Chicago conneger. He was there at the request of Poiger to usuint his in the author. Finish tiff testified that Hamman knocked his head appliest on iron post. injuring him, and the testimony of a physician tends to support the presence of injury. Veignr and Hamman both dony that there was any assault and other witnesses testify they saw as evidence of any injuries.

At this interview plaintiff signed a confession of enbestle-ent, and claims he was coursed into similar it by threats and the assault. Subsequently Feiger consulted an atterney, autoThe parties of the latter of t

At an investment of Children of April 1999, print to their hard severit single and women to the second terror of the second terror Manager, to really a series of mer second from profiles at a parallel female his delice part of some life, come on on the come the same and a sea of the same and the same at the William the select cases of the room delicated BELLEVILLE TO THE PARTY OF THE District dispenses, the first the second passible and the second s and the same and the control of the same and the graduals was all the and the last of property and he are to be about the half has about ments are present to make them no present provide AND THE REST THE PARTY OF THE PARTY OF THE PARTY OF THE PARTY. and the latter with the latter of the same of the latter than the latter the and the second control to the second control to the second about his street or a recommendation of the same state to the same state and was the second of the second o and the second of the second o and a result of the first of the second of t perform and a second of the se with the control of t and the beautiful to the control of The Later Have the Committee of the Comm engli tell earl the age of the intitle printed from impercy felt and the manual series of a

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plaintiff, with their statements that he had not registered the same, and also the register tapes showing that such sales had not been registered. The confession also was submitted, and upon souncel's advice Jaiger over out the variant upon which plaintiff was arrested.

onfined to his bed for a few days thereafter, and that while there the efficer came to serve the varrant, but plaintiff informed him that he would currender himself show he was able to leave the house; that a few days thereafter he went to the police station and surrendered himself, and says that he was leaved up in fall for several hours until he could obtain bail. Subsequently there was a trial on the embessionent charge and plaintiff was discharged.

In the very recent case of <u>Shedd</u> v. <u>Patteress</u>, 302

Ill. 355, the established rule is again ammounced that an action for malicious prosecution is not favored in the law. Flaintiff must show clearly by the preponderance of the dvidence that there was neither probable sor reasonable ground for the prosecution of the crimical suit and that it was instituted paliciously. Both west of probable cause and malice must consur. <u>Qiou</u> v.

Lawrence. 200 Ill. 561: <u>Appele</u> v. Faul. 25 Ill., 106: <u>Action</u> v.

Satholic frame Co., 254 Ill., 200: <u>Parris</u> v. <u>Lessings</u>, 419 Ill.

App. 562.

Plaintiff here not only failed to prove the conditions necessary to maintain his action, but it was clearly graven that defendant acted upon reasonable grounds and with probable cause. Nothing could be core reasonably conclusive to move infectant to prosecute plaintiff than positive statements of its agents, who reported the pilfering of plaintiff, and the records of the taps

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register unafireda; these records. It would see hardly to require argument that if an explayer sould not institute criminal process-ings upon such evidence without laying blanchf open to a soit for damages for malicious procession, employers would be deterred from attempting to have a wrongdeer punished in the courts, although convinced by almost constants evidence that a price had been complitted.

part of defendant in instituting the original action, but she viadence is in agreement that there existed no policious motive. The
prosecution was instituted by Feiger. He testified that he had
known plaintief about five or six menths before and that he had no
ill will or hatred against him; that he started the prosecution
believing Buttenberg gailty of the offence, and that he was not
actuated by any distinct for plaintief. Fisintief bioself testified
that Hr. Feiger was "nice to him. *** Feiger and I were not on
the mat. *** Feiger had nothing against so that I know of; he tracted
as all right."

It is also shown that Peiger did not est until he had consulted with souncel and lati before him all the facts and circumstances in his presention. Glam v. Lawrence, 20. 111. 501; Ficker v. Hotohklan, d2 111., 107.

For these reasons the notion of defendant to instruct the jury to find the defendant not quilty upon the malicious procedution counts absult have been allowed and such instruction given.

The refusal of the court in this respect was reversible error.

The reasons moving the trial court to give the peramptory instruction upon the counts alleging asscult are not clearly presented feiger and Hamman, ampleyes of defendant, interviewed plaintiff in the basement of the store to accuse him of emberzling and if possible to obtain a confession. Plaintiff says Hamman assaulted him.

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Although there is a considerable amount of evidence testing to negative this claim, it was not for the trial court to waigh the evidence in this respect, but to subsit the issue of fact to the jury. In instructing the jury to find defendant not quilty upon the counts charging account, the court was in error.

For the reasons above indicated the judgment is reversed, and for the errors of the court as indicated the cause is remarked.

REVERSED AND REMARDED.

Dever, P. J., and Matchett, J., comeny.

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APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

VS.

DR. J. M. FINKS.

Appellant. 225 I.A. 653

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

This is an undefended appeal by defendant from a judgment against him for \$90 in an action of trover.

Defendant purchased from plaintiff a surgical instrument under an express warranty, paying \$45 on account; the balance of \$90 to be paid in thirty days, or the instrument returned; subsequently defendant was of the opinion that the warranty had failed and asked for the return of his \$45. Plaintiff refused and started suit for the balance of \$90, but upon trial the issues were found for the defendant. Subsequently this action of trover was convenced.

Plaintiff failed to prove that defendant refused to deliver the property. The only evidence touching this point was an alleged telephone conversation, the substance of which is not clear. Apparently defendant was ready to return the instrument whenever plaintiff returned the 145 which had been paid on account. In order to rescind the contract of sale and to become entitled to possession of the instrument plaintiff was bound to pay or tender to defendant the money which had been paid upon the same. **EcGuire v.** Bradley.** 118 Ill. App. 59; **Eent v.** Jones.** 172 Ill. App. 62.

The record does not justify the judgment against the defendant, and it is reversed and the cause remanded.

REVERSED AND REMARDED.

Dever, P. J., and Matchett, J., concur.

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HARY E. PERRY.

appellee.

ARCHAL FROM

MUNICIPAL COURT

OF CHICAGO.

LEANDER J. IBJLD.

Appellant.

225 I.A. 652°

MA. JUNION POSUR LY OFLIVER OF THE OPINION OF THE COUNT.

Plaintiff brought suit to recover damages to her personal property alleged to have been caused by the negligence of defendant, her landlerd, and upon trial by jury had a verdict for jobs; from the judgment thereon, defendant appeals.

The principal defense asserted is that the defendant was not the owner of nor interested in the premises in question at the time of the occurrence causing the damages. The jury properly could find that plaintiff was a lease of the operment under a lease beginning in 1916. A renewal lease in writing was made on March 5, 1918, for a term community May 1. 1916, and expiring April 30, 1919. This lease was signed by plaintiff or leases and by the firm of Ibold & Reynolds as lessers. The Ibold of this firm was the defendant, and it was with him that plaintiff had first negotiated for a lease of the premises. In May or June, 1910, defendant, Ibola, employed some decorators to work in this apartment. Wishing to paint behind the radiators in the apartment, and finding that they sould not without removing them, the desorators called upon the jonitor and he and they uncoupled the real: ters from the supply steam pipe. This impiter worked for Ibold & Deynolds and his wages were paid by checks signed by Reynolds and also by defendant. The junitor left the wrench with the decorators who promised to connect the radiators when they were through painting. They evidently forget to de this. september plaintiff left her flat early in the morning and did

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Flaintiff testified in detail as to the condition of her furniture and apparel caused by the steam.

testimony that he did not own the property at this time and was not interested in it until 1919, the jury was not bound to accept this as the fact. There was sufficient evidence, some of which we have referred to, to justify the conclusion that defendant was the lessor and interested in the premises and that it was his servents and employes whose negligent conduct caused the danage to plaintiff's goods.

Flaintiff was not quilty of contributory negligence.

The evidence does not support the assertion of defendant that the radiators were disconnected under orders from plaintiff.

The provision of the lease that the tennat would keep the premises in good repeir, does not exempt the landlerd from liability for demages caused by his negligence. Jaron v. Johneppe. 213 Ill. App. 688.

Plaintiff was competent to testify as to the damages, especially to the articles of clothing, and the damages to the furniture were proven by an experienced upholsterer.

befordent says that the court instructed the jury in substance that defendant must prove his defende by the preponderance of the evidence. This is not justified by the record. Instructions were oral and the jury was plainly told that the plaintiff was bound to prove every material fact by the preponderance of the evidence. If defendant's counsel thought there was any embiguity in other parts of the instruction touching this point, he should have objected thereto so that it might be corrected if necessary. The

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record shows that defendant's counsel was called upon for suggestions as to the instructions, and cartain suggestions were made shich were followed by the court. Defendant's counsel was then asked if there were any other objections or suggestions as to the instructions and counsel replied "That is all."

befordent has had a fair trial and no reason has been made to appear shy the verdict of the jury should be disturbed.

The judgment is therefore affirmed.

AFFIGMED.

Dever. P. J., and Matchett, J., concur.

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ES. JUNIOS MARCHETY BUNIVERSON THE OPINION OF THE BURNEY.

The plaintiff in the trial court, who is appollant hore, sued the defendant appelloe in an action on the case for personal injuries. The declaration in several counts alleged that on February 3, 1919, the plaintiff in the exercise of due care was proming Ogden wrome when, through the negligence of deformant, plaintiff was struct and injured by a out driven by the servant of defendant. At the conclusion of plaintiff's avidence the court, on motion of defendant, directed a wordist in defendant's favor, and Judgment was entered against plaintiff on the verdiet se rendered.

The error assigned and argued in the direction of this verdist. It is concered that there was evidence tanding to show that defendant was negligent, but it is the contestion of appelles that there was no evidence tending to show due care on the part of plaintiff, and that in the absence of such evidence it was proper that the court should direct a verdict.

The rules of law applicable are well settled in this State. Contributory mogligenes by a person who has been injured iv not a matter of defense. On the centrary, due care is a necessary element of a cause of action, and the burden of proof is on the plaintiff to show due care on his part. Pourly .. Consider, 63 111. 364; C. D. S. V. V. V. V. 100 111. 360. The rule which is to be applied in determining whether the evidence

should be submitted to a jory is also well settled. If there is any syldeness from which, standing alone, the jury can reasonably find that all material averages of the declaration are proved, the sause should be submitted to the jury. Libby, McTeill 1.

Libby v. Gook, 232 Ill., 313; McTerry v. Asid, surdesh, 170
Ill., 464; Kelly v. Thirty Lit. 13. 52. 255 Ill., 540; [gHenna v. Chicago City Hy. Co., 386 Ill., 314.

The evidence most favorable to plaintiff must be taken as true.

The metion of defendant for an instructed verdict raises a question of law, and in considering the case it is the duty of the court to adopt the state of facts in the record most favorable to the plaintiff. It only remains, therefore, to apply those rules of law to the syldence in this record.

The evidence tends to shor that the accident in question occurred February 3, 1010, at the intersection of Leavitt street and Ogden avenue in the city of Unicage, at about 9:00 p. m.; that Leavitt street runs worth and south and Ogden avenue marthaust and nonthwest; that the streets at this intersection were paved and well lighted; that there are a little rain and the streets were damp and slippery; that plaintiff was returning home from a ledge meeting and was walking morth on the most sreawalk of Leavitt street; that defendant's ontowas being driven in a southwesterly direction on the right also at Ogden avenue and in the car track; that the streets were practically slear of traffic, and that there was no noise or onfusion in the street.

The evidence also tends to show that the pab which struck and injured plaintiff was running at a speed of ferty miles an bour; that it gave no warning of its approach and did

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not carry any lights. This section of the street was well built up and the rate of speed was clearly unlawful. Plaintiff was returning from a lodge meeting with some friends, with whom he was conversing as he approached Ogdan avenue. He says: "As I came up to this growing and determined whether or not the may was clear. I looked around and did not see anything coming from ofther direction and I started across. I was following the sidewalk erossing." Mrs. Plynn, she saw the accident, testifies: "It was a yellow cab, and this man was coming across the street on Ogden and Leavitt; they all came in, and this out was coming awful fact. He didn't/slow up when he got to the street car trucks; he just kept going right on, and it wont right over the street our tracks. It didn't ring the bell, and it went right over the line and this men here. He was coming west, and hit him and he fell, and then the cab went on, skidded a little bit because it was kind of rainy that night, about from here over to the door, and then they came back and picked him up. " With reforance to the conduct of plaintiff the cays: "He was walking like anybody. I guess, and he kept right on walking up to the time he got struck, and he didn't stop or he didn't hurry and go Taster." Another witness says: "My eyes were on him all the time, and he kept going on right straight morth all the time. and he was valking all the time, valking pretty slow. He was a clow man for walking, I can tell you that, and he kept walking the same rate, and he didn't change his speed at any time. He didn't start to walk faster before the car hit him. He looked around; he didn't walk any factor, and he didn't stop. stopped a nimite at the south track before he got on the north track. I think he let another machine ac by: he spent a long time, and I can't think just what went by there, but I think he let a machine go by: I think he spent a long time there; when

the last the second of the sec A grant of the control of the state of the s The state of the s and the second of the second o the second secon and make a common too the lot the common provided a participate med and the party of the party in a control of the engineering of the control of the engineering of the engineering of the engineering of the When the control of the first superior of the control of the first superior of the control of th to the property of the property of the second section of the section of th The second of th er an di nama il lago elippi dell'elip many many of the party on one of the life agree of the better and the pitch energie but his level, see J. Dir Equiessa our see 1. Control of the process of the plant of the process of the pr of a contract that they were the first and a fine of the contract of the contr making the sit. Owner has brainful to be properly and left working and the contract of the contra the quart count or so and from the fire powers. Yet, all that The second of the property of the property of WHAT HAD DEED STORY TO LAKE A THE REAL PROPERTY AND THE WARRANCE AND THE W or hell of some affirm palmer and half the pelicles are left been profess out of my joint out that has I gestion are our rate At the second of I was a second of the second s THE RESERVE OF THE PARTY AND PARTY AND PARTY AND PARTY AND PARTY. and the second of the second o the control of the co IN THE REPORT OF A SECURITION OF THE PROPERTY OF THE

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he spent a long time standing still, he was right on the surb of Leavitt and Ogden; that is, the south curb of Ogden. He stood there a few minutes or so, and he let some automobile go by. ***

After he let the truck go by he started on walking, and before he got on the track the truck was on the other side of Taylor street. Taylor street or seese Ogden svenue set very such morth of there. This track he let go by had or send Taylor street is fore he started to walk across the street, so that there wasn't anything that I noticed obstructing his view as he walked out into the street, walking slowly and from that time right on up until he was struck, he didn't change his rate of speed at any time."

It is the contention of defendant that under the circumstances and conditions disclosed it must be held that plaintiff either negligently failed to look, or, is looking, negligently failed to see the approaching cab, and it is arrued that if he had so looked he would undoubtedly have seen it in time to avoid the injury.

into consideration. He was not bound to look at one particular place all the time. He apparently did not know that the cab would approach at the time it did and from the place from whence it case. This was an intersection where, in the exercise of due care, it was necessary for the plantiff to have report for the several directions from which vehicles eight approached. We think the speed at which the automobile approached the crossing was not only material on the queetion of determining whether or not the defendant was guilty of negligence, but that it was also a material matter to consider in connection with the determining of whether plaintiff was in the exercise of due care. The owi-

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ing to prose the street, and that he looked immediately before he was struck by the cab.

We think all the circumstances - the time of night, the condition of the etrects and the weather, the bright lights at the crossing, the failure of the cab cither to carry lights or give other warning of its approach, the terrific rate of speed at which it moved - all tend to make it a question for the jury whether plaintiff was in the exerctor of due cars. Whether our conclusion would be the same if the question were before us as as issue of fact to be determined, is an entirely different matter, but we held the case should have been submitted to the jury.

For these reasons the judgment is reversed and the

ARTHRESO AND MESSASSES.

Dover, P. J., and Moderely, J., concur.

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Plaintiff in Error,

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A. J. OCHEMER. Defendant he troop. ERROR TO METERICA COURT OF GOOK COURTY.

225 I.A. 653

ER. JUSTICE MATCHETT INLIVERED THE OFFICE OF THE GODEY.

Was plaintiff below, filed a declaration in which are alleged that defendant was a surgeon; that she employed his to operate on her for a reward to be paid; that it becare defendant's duty to use care, skill and diligence, but that he was careless, negligent and unskillful in that he paralited a piece of gause, wound and matted, it inches long and 7 inches wide, to be said remain inside the bedy of plaintiff and wowed up the wound with the gause remaining therein, and that it so remained from the date of the speration may W. 1910, until December 5, 1916, to her image and injury.

The defendant filed a plea of "Not guilty;" the cause was submitted to a jury, which returned a verdict for defendant. Motion by plaintiff for a new trial was over-ruled and judgment entered against plaintiff on the verdict.

The principal error assigned and argued in this court is that the court gave to the jury on instruction. No. 8, which was as follows:

"Respecting the issue of the supposed negligenes of the defendant: The duty of the defendant was the use of all ordinary care and saution, and by ordinary care and saution the court some that defend of care and caution which an ordinary sautious and product shystolan ordinary careful bave used under like discontances. The defendant was not a varranter or incorer of cure to the plaintiff."

Plaintiff in error urges that defendant under the circumstances was obligated to use more than ordinary care and

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bawever, is not framed on the theory that defendant nontracted to use the care of a specialist. But had it been no framed, and if there were also facts in evidence tending to support such an allegation, the degree of care required would not be different. In such a case the degree of skill and care required would be that "ordinarily possessed by physicians who devote special attention and study to such organ or disease." Il R. C. L. 387.

The declaration here does not set up a special contract, and the general rule in such a case is that "in the absence of a special contract otherwise providing, a physician and surgeon "" impliedly contracts that he passesses that reasonable degree of learning and skill ordinarily possessed by others of his profession, and that he will use reasonable and ordinary care and diligence. "" Lower v. 447. 135 Pac. 570-373; servill v. Odiorne. 94 Stl. 783; Chamian v. Eleth, 57 Pac. 545-346. In Utley v. Burns. 70 Ill., 154, the court said:

"Thatever may be the character of an injury a surgeon is called upon to treat, he is only held to supley a reasonable amount of care and skill - to exercise only that degree of skill which is ordinarily possessed by members of the profession."

And in McKeying v. Love, 40 Ill. 200, the Supreme Court criticised an instruction to the effect that more than ordinary ours and skill was required in such case, saying:

"This states the responsibility of a physician too strongly, as it requires the highest degree of care and skill, whereas only reasonable care and skill are necessary."

In Makes v. Allen, 94 Ill. App., 147, this court stated the rule to be:

"It is the duty of physicians and surgeons to exercise reasonable and ordinary care, skill and diligence in the practice of their profession. To this extent they are liable and no further."

Again in <u>Goodsan</u> v. <u>Biglar</u>, 133 111, App. 301, this court said:

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"A physician is only held to the enercies of ordinary skill, and in an action for malpractice, the turden of proof is upon the plaintiff to show the vant of ordinary skill and diliganos, and to show that the injury alloged resulted from a failure to exercise these requisites."

And in <u>Fisher</u> v. <u>Hissolla</u>, 2 Ill. App. 454, the defendants asked the court to instruct the jury,

"That if they believe the defendants used ordinary skill and cure in the treatment of plaintiff's hand, and under a sistake in judgment, then the defendants are not liable for the result of such mistake ander the law,"

This instruction was refused as tendered, and the court modified it by adding a statement to the effect that the defendant should regard the well settled rules of meatical science. The court held that "the instruction properly stated the law without the modification." So who Erager v. Recountry. 140 Ill. App. 440: Quinc v. Renovan, 25 Ill. 194.

It is also urged that the instruction is erroseous in that it uses the term "ordinary" core instead of "reas mable" care. The cases bold that these parases are equivalent. Thus in innially. Prosp. 74 Ill., 235, the court in discussing this question said:

"There is no substantial objection to the instruction given for appelles. The words 'ordinary' and 'reasonable' need in infing the nature of the care and skill expected of a physician or urgeon is his amployment, have been interchangeably used. Highey v. West, 23 lil., 280. Perhaps the word 'ordinary' would indicate nore clearly to the common and the degree of care and skill which he (the physician) is bound to average in his professional engagements."

In B. & O. S. W. Sy. Co. v. Faith, 178 Ill., 58-60, the Cupress Court said: "'Due care,' 'ordinary care,' and 'reasonable care' are convertible terms." To the same effect are L. C. R. E. Co. v. Hoble, 142 Ill., 878-584; C. R. & G. By. Co. v. Terty, 138 Ill., 321; Michell v. Libby, 140 Ill. App., 5-1-506; Tana & S. O. R. Co. v. Yalker, 138 L. R. 80-106; Harley v. Pi. Ledge L. & F. Co., hor S. W. 593-894; Interp. G. B. A. G. V. Trung, 94 S. W. 903-906. Also in vol. 4, Words and Phrases.

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page 149, it is emid:

"*Resonable and ordinary care," which in law have the same meaning, is the care which massers to all ordinations has under like circumstances."

Plaintiff in error also criticises the instruction because, she says, it does not require the exercise of the sare of cantions and prajent surgons in the news locality. We think this criticion is without merit. As defendent in error points out, the instruction is limited to the question of care only, and the degree of ours required in the same whether the operation be in a large pity or a small one. True, skill may very with different Loudinian and different opportudition for learning, but the instruction did tell the jury that the defendant was bound to everoise that degree of care and sention which an ordinavily emitious and present physician and surgeon rould have used in like directstances, and these like obsumetances included all the facts, ascent with were those - that the Copration in question was performed in a heaptial touated in the city of Chicago by a surgeon practicing his profession in that sity. columns v. New, 10 513. App. 400-400, is raited on, but does not, so think, sustain the contention of plaintiff in error.

The judgment is affirmed.

AFFIRMED.

Dover, F. J., and Wellarely, J., noncur.

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APPRAL FROM MENTO IPAL COURT OF CHICAGO.

225 I.A. 6595

ER. JUSTICE MATCHET PELLIVERED THE OFFICE OF THE COURT.

The plaintiff below, who is appelled here, filed its statement of claim in which it alleged that the defendant was indebted in the sum of \$17%.40 for storage, work and labor and supplies furnished by plainting to defendant, ... per as its ited at the ment attached thereto. In the alternative the came amount was claimed as an account stated. The defendant filed an affidavit of merite, denying the indebtedmens and claiming an offset to the amount of \$500, in that she had taken her automobile to plainiff's garage and had given plaintiff, wordfie instructions that it amould not permit anyone to take the our out of the garage or use it orcapt upon the personal application of the defendant or upon her written order; but that in disregard of such instructions the plaintiff had permitted the oar to be so token without her knowledge and concent, whereby it was greatly damaged and she was obliged to pay out a large amount of money for the purpose of repairing it. To this claim of offset plaintiff filed an affiduret of markte, doaying the material facts overred therein. The court heard the evidence and found the issues against the defendant and in Cavor of plaintiff and assessed damages to the sum of [107.0., for which mass judyment was entered.

items which it alleged were due, but these items were not proved by any competent evidence. On the centrary the court, over the objection of defeadant, permitted copies of certain original bills.

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in evidence, although there was no notice to defendant to produce the originals. Moreover, it clearly appeared from the sulfance that the defendant had at no time acquienced in the error time of the bills as mailed to her from time to time; but, on the contrary, rejected and refused to pay them. Aside, therefore, from the incompetent evidence received, there is no testimony tenting to show the measure, if anything, which was noturally due to the plaintiff, and the judgment must be reversed and the cause remembed.

FORVERS O AND SEC SEED.

Dever, P. J., and McSurely, J., concur.

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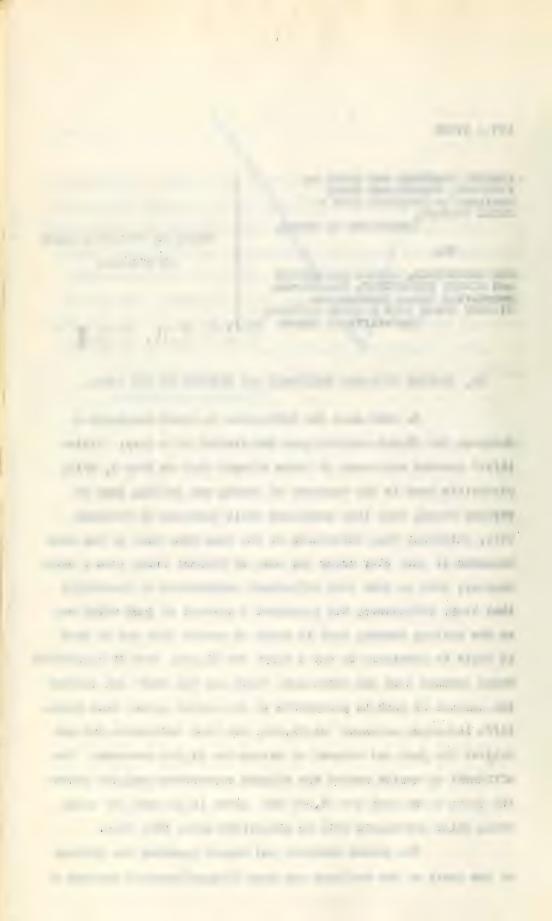
NAMED TO EXPERIENCE OF STREET OF CHICAGO.

225 I.A. 654

AN. JUSTICE BATURETT DELIVERED THE GRIEJON OF THE COURT.

In this case the defendants in error resovered a Judgment for \$1,000 entered upon the verdict of a jury. Plaintiffet moonded statement of claim alleged that on June 3. 1918. plaintiffs were in the business of baying and melling funk of various sinds; that they confusion their contages at blincom Oity, (klahoma: that derendants at the same time were in the name business at that city under the news of Alghest Place from Meral Company: that on that date defendants represented to plaintiffs that they, defendants, but purshased a carload of funk which was on the railway tracks; that in order to secure this ear of huck it would be necessary to pay a droft for \$1.000; that if plaintiffs would advance this mun defendants would pay the draft and deliver the carload of junk to plaintiffs at the market price; that plaintiffe thereupon advanced the \$1,000, but that defendante did not deliver the junk and refused to return the \$1,000 advanced. affilarit of marite desict the alieged representations, and elected the facts to be that the (1,000 was given in payment for soran metal which defendents sold to plaintiffs about that time.

The errors assigned and armed question the miliage of the court on the syldence and urgs alloged improper remarks of



the jury.

The controversy between these parties involves a clean out issue of fact as to whether the \$1,000, which it is not disputed plaintiffs said to defendants, was given in payment of funk actually delivered or for junk which was represented to be upon the cars, but which was never in fact delivered. The evidence for the plaintiffs was given by depositions, and no motion was made by defendants prior to the hearing to suppress these or any part thereof: therefore, in so far as the errors assigned and argued are based upon objections made to the introduction of evidence. either on the ground that it was secondary in its nature, or that it stated only the conclusions of the witnesses, the contentions of the plaintiers in error cannot be sustained. Cook v. Orne, 37 Ill. 187; Dunbar v. Group, 44 111, At ., 307; hall, A. M. My. M., v. Thives, 108 flt. 617; 1. J. T. 1. V. Joully, 103 flt. 17. This statement of the law disposes of all the contentions of plaintiffs in error with the exception of those hereinefter noted.

Picistiffs in error contend that the court errod in admitting, over their objection that the same was invaterial and irrelevant, testimony of one R. E. Fells, acclustant member of the Farmers Sational Bank of Okinhoma City, Okinhoma, Tells testified that he was acquainted with the credits of the bank and with its depositors during the year 1918. He was then asked to tell whether or not the Highest Price Iron & Motal Co. or Albert, Sam or Mathan Bloomfield had an account at his bank during that year in the menth of June. Upon objection being made, attorney for plaintiffs promised that he would connect it up and show the court that the evidence was material and relevant, whereupon the objection was ever-relad and the strass replied that her II set. Plaintiffs in error contend that this evidence munifestly proved nothing pertinent to the Assues and that its only object and its only effect was to prejudice the jury against plaintiffs in error.

with the second against the second state of the the state of the s and the second of the second o this is the second of the state talk to the control of the second of greater than the case of the control of VI The Art Street, so granitude, or some will be built the second in the electric contribution of th many through the same and the same of the same group the first of the first of the section is a section to the section of the se the process of the first process with the first process for the second s in actual to the figure of the company of the compa THE PERSON NAMED IN COLUMN 2 IS NOT THE OWNER, THE PERSON NAMED IN AND RESIDENCE OF STREET, STREE of the party of the party of the party of the party of to produce and the Tay property and the investment and more committed and as advanced and also detailed that to been now in the copies then it affiliated.

They also were that the evidence was never connected to as ar wised.

Thore was evidence tonding to allow that pinintiffs in error case a sheet for \$100 to the order of defendants in error. which check was deted way 31, 1910, drawn on the Farmers intopul Eark, and that this check was never in fast baid. One of the defendamie also stated in his testimony in substance that he command from this bank a quehisr's about for blad in payment of the chock in controversy, and that this chook was deposited by the defendants and used by them in the course of their business. There was also evidence toodia; to show that this was not true, and that one of the defendants unto the angular's check for \$1,000 to purchase a draft on the Reshands's A Notal Marianal Lank of New York, anyable to bimself. We think, therefore it became a proper matter for inquiry whether defendance in fact had no account with the Daymers National Bunk at that time.

Plaintiffs in error also insist that the court aread in parmitting Kathan Blocafield to be interrogated as to his teetimeny or a former trial of a suit brought by plaintiff's against defendants on the \$100 check hereinbefore mentioned. He was saked whether he was present at that trial before Judge Hans, to which he replied. "You." The following then occurred:

AR. MIRRIE: At that time did I ask you this question: mase of the Sighost Frice Iron & Metal Company, and did you ABSTRAT BOY

MR. MERRICHE: I object to that. THE COURT: Chjeckion ever-miled.

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A. I den't remailer.

Didn't I during that trial show you this check for one thousand dollars? A. Did you?

Q. Didn't I show you this shock at that time? A. I don't knew, I will take your word for it. Q. And didn't I show you your mans on the back of it?

I will answer that the same as before. ME. MERRIMENT: I object to this abole line of questions. if the court please, as highly improper.

THE COURT: Objection over-ruled.

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MR. MORRIS: What is that? A. I don't know. Didn't I ask you if you were employed by the Highest Price

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Chical Str. Dellie - Di Dolony and terror tree \$2 years that I granter the Iron & Metal Company' MR. MENERGENE: Name Objection as before. THE SUMMER Owermaled.

annout tone A. I could not answer that.

And didn't you say at that time that you been simily a is a contract the matter shall a bandom our there?

ER. SPERBURNE: I object to this as impaterial, shat he

did in that out.

I will make it meterial. (To witness). Didn't MR. MINITE: I ask you at that time what your interest was in the Nighest Prime Iron & Matal Company, and didn't you say you were misply an amployer

ER. SEERMEES: Again I object.

THE CHARACT Groraulad. Expection.

And didn't I wak you whether or not you took MI. MOINTAI thin money on the obsect, and didn't you may 'you'!

HR. DENTERNIE: The same objection, if the court plause. THE UGUNT'S Overraled.

Tarrention. MIL MOTERINE You ar mo!

A. When was that and commenced?

9. Thui was on trial before didge Hans in June, 1919.

A. I could not tell you what I said two years ago.

q. Didn't I ask yes whether you took that somey, and tion't you say they eved you a transcal deliver and that you task the somey on the check and laft? A. I don't think I said that. d. You don't think you said that? A. I would not any for

Ton doubt le? 120 Yea.

Mi, Manham: That is not proper cross-era inciden and I main shipet.

THE COURT Cyerroled. Exception.

il. MUSTIL: Did you do business in Chishesa City un or any other nows than the Elghout Frice Iron & Motal Company?

en, unangang, Cojented to as terrorer gross-exactivition and as wholly immuterial.

THE COURT: Objection overruled.

Buseption.

I think we did. That was during my stay in Dilaboom . 1191 I don't just recomber the name it was affice the Speat Teatre or the Northwestern, pomething of that nature."

Thereupon, over the objection of defendant, a vitness was called who touthfiel that he say present at the trial before Judge Base, and that Wather Blanufield there contified that he, Mathan, was not a sember of the Righest Price Metal Company of Okalhoma dity in May, 1910; that he had no connection with that someny; that he was employed by it as a bookkeeper at a salary of 195 a week; that he, Mathan, had received \$1,0.0 on the check to controvery, and that when saked what he did with the somer

processor in the last of month THE PERSON NAMED IN A STREET HERMAN AND LINES SPECIES HAS RESPECT in the man Public See, 48 THREE CHINASENS and a female and the real of the same I AUTHORN SHALL BELLEN steamer II mer tale to The second secon ALC: NO. places now on the case of the last but the party of the last but the l TMS1270F-204 Albeitele i Kilman, 197 CTRITE Day OF GLORIUS DRY 2010 3 (THICK) THEY TALL SHARE AND TATE THE 2NO STREET, BUT LEVEL WITH BE READ THAT taken may by the trans help that by the state of the Alla Controll . Profitto GER 计数据 医多种溶液 TAG 59 AC 187,000 STATE WAS THAT ALL STATE . . they was in particularly report from the last of the last 13 one errors and also I bell may filled the falme I . The party and th . CONTRACTOR OF A STATE OF THE ST the above the state within the transfer of the transfer and with themselves the constitute Salvay Constitution and the second waste to the second 41 11 12 24 25 174 18 20 3 the transfer of the control of the c the transport of the extrement of the legal and the standard of the filler to the state of Blow or will -Chichester midwight AND LINES and the Armengal of the above that the last per deep let a letter de la grand de la production de la and the explorer is the explorer with sure persons in person fully and in forces and or said Armines and harden and the large of the term of term of term of the term of term of term of term of term of term of term to proceed to a control of the base of the ways of a period of There is a superior of the property of the second property of

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graphical security for the contract that the first program is a second of the contract of

Hathan replied that they owed him \$1,000 and "I took the money and left."

It is elementary that a witness may be impeached by proof of prior inconsistent statements made about unterial matters (Craix v. Tratter, 252 (II. 230) and that a vitage may not be toposched on such statements made about impaterial matters.

To think that questions as to the relation which witness austained to the defendant opportnership at the time of the
transaction out of which the suit arcse, and as to whether he had
received the proceeds of the 31,000 about in controversy, and that
disposition the witness and of those proceeds, were all material
under the issues.

Plaintiffs in error also insist that the court errod in remarks made during the course of the arguments. In his talk to the jury the attorney for the plaintiff, according to the record, said:

"As says we are trying to sloud the ferroes; that I sat on an exployer, who testified that not be bloomfuld evero that he was not a partner in that tesinose, and that is true. There is no evidence in this case as to what the first case was, but the account case

The Court: You refer to the mult in which he testified he was not a partner?

Mr. Morris: Wes, when he testified before Judge Hass and said he was not a partner there."

The record above that it was affirmatively proved that Nathan Bloomfield had so testified and that he did not specifically dany it; but however that may be, this record fails to show that any objection was made at the time to this statement of the nourt nor motion made to exclude it from the jury nor instruction asked that it should be disregarded. We think if defendants reported this statement made by the court as prejectional, they should have at that time made some nort of objection to it. Not having done so, they are preduced from unging it me error here.

We have gone ever this evidence carefully and think

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that the verifot of the jury represented substantial justice. This having been done, the judgment is affirmed.

AND THERED.

Dever, P. J., and Moburely, J., concur.

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A. M. BLOMUFMIN, Appellac.

TH.

CARL J. APPELL.
Appellant

OF CHICAGO.

225 I.A. 654

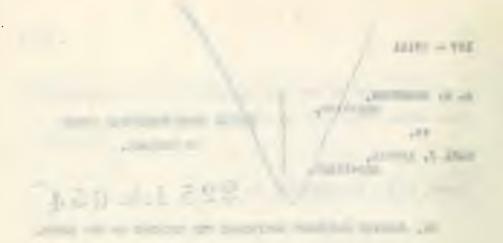
ER. JUSTICE MATCHETT DELIVERED THE OPINIOS OF THE COURT.

on trial before the court without a jusy. The claim was for seal furnished by the plaintiff to sary a. Powell, also snown as Mary 3. Appell, on various dates from December 20, 1516, to Pebmary 17, 1910. It is not disputed that the coal was in fact delivered, and that its value was \$55.60, which was the amount of the judgment; but the defense is that the coal was furnished at the request of Mary 2. Appell and not at the request of defendant; that she was not defendant's agent, and that (while he was at one time married to her) on December 10, 1919, prior to the delivery of any of the items such fur, defendant obtained a decree in the Circuit Court of Cook County annualling his marriage with her.

In an analogous case, <u>Sass</u> v. <u>Slutcky</u>, No. 37041, in an epinion filed April 1, 10 3, not yet reported, we held that a plaintiff might not recover. There the plaintiff such the divorced husband and father for medical services rendered to a minor child whose custody had been given to the mather. We held that the father was not liable in the absence of an ampress promise, or facts and circumstances from which such promise might be implied; that a plaintiff could not recover under the "Panily Lamance Statute" where there was no family in fact. It is not necessary to report here what was there said.

The judgment is reversed and judgment of mil centar entered here.

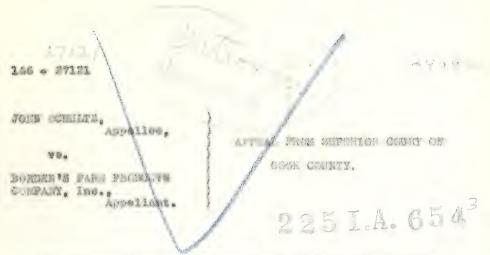
REVERSED WITH JUDGMENT OF HIL CAPIAT.



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MR. JUSTICE MATCHETT DELIVERED THE OFFICE OF THE COURT.

This is a case where the plaintiff brought as action in the case for personal injuries, and on trial before the jury obtained a verdist in his favor for the sum of \$5,000, on which the court entered judgment, from which the defendant appeals.

The declaration originally consisted of several occuts, but all these counts were withdrawn with the exception of the first, which alleged that defendant was in possession of a serial notor track operated and maintained by one of its servante acting within the scope of his authority; that plaintiff was passing along bloton everse in the city of Unicago, and in the exercise of the cure, when the defendant's said truck maghinently ran into him, inflicting in-juries for which he such. The defendant pleaded the general issue.

One of the errors assigned and argued is that the court refused to give certain instructions requested by the defendant.

These refused instructions are numbers 5, 4 and 7 repositively. By
the third requested instruction the defendant maked the sourt to instruct the jury

"that the claintiff and defendant are equally suitified to a fair and impartial trial in this case. You should not be everyof from giving such a fair and importal consideration of this case by any natural sympathy you may have for the plaintiff because he was injured, or because of his an arent financial condition as compared with that of defendant, even if the case should appear. You are not to allow passion or prejudice to enter into a determination of this case, but should reason our provider tainly and importially, based on the proponierance of the evidence in the light of these instructions."

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Refused instruction number 4 was as fellows:

"You are further instructed that the mere fast itending alone that plaintiff was injured by the truck of defendant, would not warrent you in rendering a verdict in favor of plaintiff. It must forther a mean that defendant by its driver feiled to exercise ordinary care towards plaintiff, and that such failure was the sole cause of the injury to plaintiff,"

Refused instruction number 7 was as follows:

"The court instructs the jury that in this case no wilful or wanton negligence on the part of defendant has been shown."

So far as instruction number 4 is concerned, we think it was clearly not error to refuse it, for the reason that the subject matter of it was fully covered by other instructions given in the case. Refused instruction number 3 was also, we think, in part covered by other instructions, and was also subject to the objection that, as to several propositions, there were no facts in sydence on which to base it.

As to requested instruction number 7, in the original declaration there was a count which charged that desendant was mulity of wilful and wanton megligence. This count was withdrawn, but appollant contends that alkintiff was allowed to argue to the jury that the conduct of defendant was wilful and wanton, and that the instruction about have been given in arger to prevent any sigunderstanding in this respect. The language used in argument which it is contended justified this requested instruction was an follows: "Now, gentlemen, let us onelyne the defendant's story in this once. Don't you think that that driver was guilty of nuclipense! Don't you think he was guilty of reckless and wanter disconduct, contin-In view of all the instructions given, we do not think the man ? a jury could have been sieled by this into a ballof that the issue was whether defaulant was guilty of wilful or wanten nogligence. If that had been the question, contributory neglicance on the park

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of the plaintiff would have been sholly imputation, and the jury were repeatedly told in instructions given that if plaintiff was quirty of contributory neglicance be could not recover. Under all the circumstances, we do not think the failure to give this instruction was error.

fact, the plaintiff was, under the evidence, mility of contributory aegligmos and failed to prove due care, and therefore sould not recover. Some of the uncontradicted facts in evidence were that Illian avenue is a public highway running northwest and southeast in the city of Chicago; that it is intersected by Cortland etreet, another public highway, which extends east and west; that in the widdle of Islan avenue were double street car trake, ever which the street care ran north and south; that on each side of the tracks were a space of from 12 to 15 feet in width, intended for the use of teact and vehicles. The accident in question constraint rebrancy 27, 1930, at about cleven e clock p. z.

employed by the Marikwastern Terra Cetta Co., at its plant located east of the scene of the accident, and was returning to his home, walking in a vestorily direction on the auth side of Certical street. He carried a test of wood about six feet long and six inches aquary weighing 40 or 50 pounds. He proceeded to cross Eleten avenue, and when aver to the first rail of the sast track was struck by a heavy truck evend by defendant which was being driven in a southerly nivestion on the cent or left-hand side of Eleten avenue in the center of the marthoused street car track. It is annotated that no here was blown or varning given by the driver of the approaching truck.

The apoed at which the truck was being driven; whether it carried sufficient lights; whether under the circumstances the

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driver was notingent in driving an the left side of the extent of distance the bruck rem after striking plaintiff and the extent of the injuries which plaintiff received; the actions of plaintiff tending to show care or want of it; were all questions of fact to be determined from conflicting evidence, on thich, however, the jury has passed and decided in plaintiff's favor.

Plaintiff auguests several respects in which he says
the evidence indicates negligence on defendant's part. It is said
that defendant's driver proceeded at an ingress rate of aread; that
he failed to give a signal or warning of his approach; failed to
asintain proper lights; drove on the group side of the street and
failed to keep a proper lookest. The occurrence witnesses for
plaintiff were plaintiff, a police officer who was riding on the
front platform of a street car which was moving in a southerly
direction behind the truck, and the motorum of the street car.

In behalf of the defendant the driver of the truck was produced, and his evidence shows that he was looking backward just prior to the accident and did not in fact see the plaintiff until after he was struck. We have examined all the evidence and doubt souther it shows the rate of speed was negligent; but there is no doubt that the driver turned over to the wrong side of the street, and the contention that this was justified by reason of frozen piles of snew as the street is not sectained by a prependerance of the evidence.

carried lights on the front part of it. The failure to carry lights at the rear we think had nothing whatever to do with the accident. But we also think that on the driver's own evidence he was clearly negligent in failing to keep a looksut in front as he approached the crossing, and the jury was justified in finding that defendant was negligent for that reason. The only question

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Wheel and hard hard hard after all the discussion will not an extend belongs as well all a contact and an extend and the analysis of a second of the second and an extend of the second of the second

remaining in the case, territre, is whater plaintiff proved that he was in the exercise of the care, or whother, as defendant contends, he was guilty of contributory negligence.

As defendant's cocurrence viluesees did not see the plaintiff until after the meetent, me direct evidence was produced by defendant on this point; and the noter as and the solice of ficer also toolify that they did not see the plaintiff until after the moddent accurred. The quantion, therefore, of plaintiff's due gare and contributory anoliganus must be determined from the circomplances which appear in the case, as bereinbefore related, and plaintiff's own testiment as to what ecourred. He ears that he parried the stick or his lest choulder; that when tired be would put the stick down for a little most: that the otick weighed forty or fifty promis; that he relied on the south side of Cortland street, going west: that when he came up to Elston avenue he was a stront for with was uning worth; that when he now it, it was about Fifty feet enath of Cortland street; that he watched there for the car to get ever. In response to the question, "Tall us how it was then?" he realise, "The our was coning up to liston; I was once up to Ilaion avenue, at I stopped, the car was same south and runs up to north, and chan the our was over, then I loosed, you know, suth, and I didn't one nothing on the our track, and then I started to walk, and just them, when I looked north the truck was some." "G. Hight them, when you looked north, you saw the truck? alr." He further says that it was about 30 or 40 feet away when he pay it, and that it was running fast marces Cortland street.

Appellant suggests that if plaintiff had looked he would have seen the truck, and that if he did not look he was elearly negligent. That rule is not absolute. In each case the question of whether the plaintiff is guilty of contributory negligence in much a case must depend upon the particular sires extances.

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all who find the tribular many the contract of the contract of the contract of the contract of and work the state of the same The state of the s will be set out to be an included by the party of the par the course of the case of the and the same of the proof of the proof of the party of th the second second second residence in the second se make the state on the same which a too may gather the day THE RESERVE AND ADDRESS OF THE PARTY OF THE I be at the same of the same of the best place and a place of troop are 11, 12 for an even part of the species are finite our desire. and the second second second second sect of the and the same of the course of the same of the course of th mulitaria (n. 1921). Esperante esperante de la completa promoto. I to the control of the same and the same and the in the second of the second of the partition of the " in the second code old in his place perior. Their set up to person better on one pass with the ment there have no an all games have it good these wanted all in banks the said Hard the life has present bull agreent facilities will be all the all as brief her Dilpinio II hert altenges berillend

would have aged the letter, out this if in (a) and had he can see that the can see that a constitute of the can see that he can describe the can are a constitute of contains of contains of contains and the can be constituted as a constitute constitute constitute of contains the case has been been a constituted or constitute constituted.

Here the fasts that plaintiff was carrying a stick of word, that it was in the night time, that the truck moved over to the wrong side of the street and approached him, therefore, from a direction which he would have a right to presume it would not come, are all, we think, matters which node the question of his neglicense one for the jury, and we do not think that under such attractiones we can interfere with their worder.

Appellant also makes the contention that the damages are expensive. Plaintiff tratified that the track passed over his shoulder. In view of the weight of the truck, the heavy load it parried, and the nature of the injuries which plaintiff received, we are natiafied that this was not the ouse. The injuries sould have been much more perious had that been true. However, platetiff's injuries were not light ones. He returned to his work, the evidence chove, on April 18, 1930, and at the mane wages he had received prior to the accident, but he did not do the name class of work. He was given lighter work to do. He afterwards went back to his regular work, which was filling boilers. The physician who first attended him says that on excellection he found a dislocation of the claylele at the distal and, at the shoulder and, a fracture of the sample at the lower angle and a bruise of the muscle over the secoula; that the dislocation of the clavicle was at the shoulder and, right ever the shoulder; that the dislocation was forward and outward about throo-quarters of an insk; that the fracture was marses the outer lover and: that it was a se-called green stick fracture, where the bones will be partly broken and still a fibre left at the lower and, making a sort of hings of it; that he set the shoulder; that he set the clavicle by strapping it down oute the simulder and then funtering it becovers so that it would stay in position, and set the coapula in an immobile position no it would remain where it was: that he saw plaintiff the first

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the past of the pa At head agreed one general and his fill-last and his weapont. Josephinia produces believe about all published on the restor of a low planting Algo minimi en anno el faron ene esta estretto este ele MARY NAME AND ADDRESS OF THE PARTY OF THE PARTY OF THE PARTY. THE RESIDENCE WAS NOT THE REST, IN COLUMN 2 IN THE PERSON OF THE PERSON had be more your set to have pivil all 1990, at profit resulting media new cold on the All and per appropriate oily on young law being and extremely the specific of the complete of aget of explored the galactiful of the file of the state of the file of the state o AND PARTY OF PERSONS AND PERSONS AND PERSONS AND PARTY AND PERSONS a plant of the entire of the plant of the entire of the en The control of the control of the promotion of a second makali da karangan karangan bakaran sebagai karangan bakaran sebagai karangan bakaran sebagai karangan bebagai 1 If the problem is all participant and the problem in the prob the second of the second of the second of the second of THE TENNES OF THE PERSON OF THE STATE OF THE Market in the product of the first of the first test that the first test that if you is because it conserved any the fill-later will him went eriting the state of the contract of the state of the sta instruction to the second of the providence of the second of the second

three weeks about three times a week and after that, probably for a few wooks, twice a week; that he saw his in all he would Judge twelve or thirteen times; that he reduced the distocation and set the fricture and had lorsys taken; that after taking the dressings off he found there was a little orapitation in the outer angle of the claviole; that there was sene strophy of the muscle atinclinate at the lawer and af the compiler that this parateted up to the last time the witness and him; that crepitation is a friction sound, that it shows probably there is some roughness left in the joint, in the articulation, probably some exudate off of 1t; that there is a slight appeard hightation of votion because of the condition the joint is in: that the arm itself works in the socket and is not injured; that the hintrance is in raising the shoulder, not so rack the notion of the arm as it in in raiding the condidor, because it is the outer and of the cheviale, due to the condition of the joint. The physician says that the strophy is probably permanent; that it may last for several years and may never be right: that he charged for his services \$125. The X-ray plates were received in evidence.

Another medical expert testified for plaintiff that on examination of the plaintiff objectively he found a creaking noise when he moved the aboulder blade up and down, and found acut westing on the best and shoulder; that on top of the shoulder he found some limitation of metics is several the are backwaris; he says that the creaking is a subbing of the shoulder blade and callus on the shoulder blade against the ribs, due to a fracture, and that he found the muscles of the shoulder wested; he was also of the spinion that the condition as to the limitation of ation and as to the creaking noise was permanent. I ray plates taken were introduced in evidence, and the defendant introduced medical testimony as to this.

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Dr. Enapp. for defendant, testified that he commined the plaintiff February 70, 1000, at his boss; that he manipulated the shoulder, raised his are up and down, and could discover no crepitation or evidence of a fracture; that he advised in A-ray, which plaintiff agreed to, but on the maxi day refused to have it taken. Dr. Enapp says that the clavicle was nor al and in place; that it was not broken, but that there sight be something wrong the the seapula, the shoulder blade. Finituliff's sublist 2 does not indicate at a fracture, nor do the other places so indicate.

In reply to an hypothetical question Dr. Enapp gave an opinion hat the injuries sustained were not parament. On arossenseination he stated that there might be a slight dislocation.

had emmised the plates thereughly; that us to the clevicle there seemed to be a slight elevation of the outer end of it and that was about all; that there was a slight separation there; that it was one-sighth to ene-quarter of as inch separation; that he sould not find any fracture on the plate at the tower end of the search.

Testifying as to exhibit 5 Dr. black said, "The line is marcas the acreaisn process of the scapula, and I would hesitate to may that it was a fracture. It is probably due to the other process of the scapula, the coracold process." To also mays that in his opinion the plate does not indicate a fracture of the scapula, and in reply to an hypothetical question said that in his opinion the condition was not permanent.

We are frank to say that if we were sitting as a jury we would not allow damages in so large an amount to the jury in this case assessed; but we do not think, under all the observationous in evidence, that we can say that the verdiet of the jury was so large as to indicate passion or projudice. The judgment is therefore affirmed.

Applying the content of the passion of projudice.

Dever, P.J., and Haburely, J., conmir.

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TILLE O. MOTARD, Deing Business

Appellant,

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JANSE C. DAVIS, Director Coneral of Reilroads, se Agent, etc., AVALAI IMAM MINKOIVAL CANNI BY ONKCAGO.

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BR. AUSTICE MATURETY DELIVERED THE OPTIMOS OF THE COURT.

Plaintiff in the trial court, who is appollant hope. filed a statement of claim in which he alleged that an Boverbor 10, 1010, he delivered to the defendant 361 tube or butter in first-class condition, to be delivered by the defendant to the Missley Crossery Conseny of Fort Worth, Marse: that derived ant was instructed to kee: the war fully look and maketale atablesi. vefrigoration; that owing to the negligeness of the defendant in failing to properly ice the car and in falling to furnish a suitable our and in failing to improper the our with our ty, the butter arrived at Jost worth to a duraged condition, to the injury of the plaintiff in the sum of \$866.02. The defendant filed an affidavit of morits, admitting that the butter was received for transportation, but alloging that the quantity and quality of its condition was unknown to the defendant; he denied that it was in first-class condition, decied that the defendant was negligant in any respect alleges, and denied that the butter was damaged in any way. The leanes were subsitted to a Jury, which brought in a variist for the defeatment. Plaintiff's ration for a new trial was ever-ruled and judgment embered on the vertice. The plaintiff, at the close of all the evidence, moved the court to instruct the jury to Tind the issues for the plaintiff. This motion was denied by the court, and this is the principal error

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or modelness by the arrange black that the particular named in the control of the control Market of the second of the contract of the second of the the second of the second of the published the party of the published the MARKET Processy Street, at First Property Called Market Street AND THE RESERVE AND THE PARTY all measures are in considerated by the sales had realisable from Military to graphic for the control of military in security a manual the part of the relative to terrorise the part of the terrorise state to to the development of the contract of THE RESIDENCE OF STREET AND SECURE AND SECUR If he have an plantage out of manufacture particulars, \$61.50. ment for commercial per four facilities, positioners reclinated for laws the second secon the state of the s the state of the s C. W. Bush of Part 1.7 recorded to the second of the second second block the second second second block the second s estination and the state of the name of the contract of the co alloged and argued here. Appellant says not only that the court should have so instructed the jury, but also that the court should have instructed to assess plaintiff's damages at \$333.40.

In total plaintiff's contention that the uncentralized evidence showed that the butter was damaged to the assess of three conte a pound. Insecues as the motion did not ask that the damages should be assessed, we cannot hold that there was error in that particular respect.

Nor do we think the court erred in refusing to di-

Finintiff in its statement of claim did not seek to charge the defendant as an insurer, but alleged specific negligers. This negligers are alleged to be that defendant and talled to keep the car properly iced. The defendant introduced evidence tending to show that it was not negligent in this respect. The plaintiff also introduced evidence tending to show that it was not negligent in this respect. The plaintiff also introduced evidence tending to show that the traceportation, although a children not alleged in the statement of claim, and the evidence wholly failed to show that the butter had been damaged as a result of any such delay.

We think there was evidence from which the jury might conclude that the defendant was not negligant in any respect alleged, and we also think there was evidence from which the jury might properly conclude that the butter was not damaged as alleged.

The evidence of experts called by plaintiff, who examined the butter prior to its shipment, was to the effect that the butter secret 90, putting it in the class of first at to butter. The testimony of other experts called by plaintiff, who examined the butter effect it was delivered at fort versh, was is the effect that the butter, in their opinion, upon its arrival there end in the condition it then was, should have been classed as second

All in largest of liver Paper At 1994 in \$1.00.

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 erade buttor. One of plaintiff's experts, Mr. Blaschard, rue intorregated and answered as follows:

Mr. Blauchard, what is the difference between first and

second grade butter, please sir? A. Vell, it is the quality of it. Q. Now do you deter has the director; is there may test you Live 117

A. lo, there is no test I live it. I just to sta it for to part, I as no expert in the husiness.

There is a test that our be given to butter to absolutely 10 determine what grade it is, is there not?

16.4 You did not tost this button?

A. w Bon Bir

4 You are not muslifled to make this test?

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No. sir. You do not know of your own personal knowledge, do you, Mr. Blancourt, us to what condition this latter was in chem it are

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You did not see it in the car? 1 I did not see it in the car."

There is also in the record uncontradicted testimony to the effort that the source of butter depends to a large patent on the individual the motor the ecore, and to a great extent upon the maniet in which it is scored; that there is, for instructe, a diffurmor between the surve in her lors, Chicago, and the jouth,

We think that under all the circumstances the jury was justified in concluding that the plaintiff had failed to ostablish that the latter as delivered one first-class, and that at the time of its arrival at Fork Worth it had be me secon welless butter by reason of any neight once of defen aut. There is none evidence tending to show that the containure in which the lutter was placed were broken suring transportation, and that some damage occurred to the butter for that reason: but it does not amount from the evidence which party was at fault in that respect.

The judgment is affirmed.

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Dever, P. J., and Medierely, J., concer.

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184 - 27139

ROBALIE M. LADOVA.

Appellee.

WS.

VITAGHAPH, Incorporated, Appellant.

APPRAL PROM

OUF CHOR COURT.

COOK COUNTY.

225 LA. 655

MR. JUSTICE MATCHETT DELIVERED THE OFFICE OF THE COURT.

This is an appeal by the defendant from a judgment for 1500 entered on the verdict of a jury in an action on the case for personal injuries. The declaration alleged that the plaintiff was walking on sebach avenue in the dity of Chicago, and in the exercise of due care, when she was struck and injured by a truck negligently pushed and managed by defendant's servonts. The defendant filed a plea of the general issue.

The only error assigned and argued is that the damages awarded are excessive, and that the judgment should therefore be reversed or a remittitur required.

The plaintiff is angaged in the practice of medicine. The evidence tends to show that the accident by which she was injured occurred about 3 p. m. March 18, 1920, when she was walking upon sabash avenue. At that time a hand truck, which was about three feet long and eighteen or twenty inches wide, pushed by two boys, sas, according to the evidence for plaintiff, negligently swerved around so as to strike one of plaintiff's lever limbs.

Plaintiff says that the blow as so hard that for a soment she thought har leg was broken; that the pain was tarriffs; that she leaned against a building and stayed there a little while; that she then must into the building and leanted the boys who were in charge of the truck on the account floor; that she then went to the effice of Dr. heifert, at livishings bouleverd;

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that she limped so she maked and was in pain; that the limb was examined there; that there was a swelling on it about the size of an hears egg; that it was dissolated black and blue, and the limb itself was painful and tender; that she then went home, loid down and slovated the limb and applied het forestations to it; that she kept this up for about a sock, and during that time suffered pain; that the swelling did not subside for two weeks, and the dissolaration for six smeks, during which time she stayed at home. He said that the limb pained her whenever there was a change in the weather "like rhoundtic pains."

She says, as is customery between physicians, Dr. seifert made no charge for his services, and the scholar that she does not remember that she was called to attend anyone whom the did not attend by reason of the injury.

exemined the plaintiff's right limb, and found a bruised area about the upper third of the shin bene, about two or three inches in diameter, black and blue, with the usual symptoms of a bruise and with the usual tendernose; that later in the same month, he saw the plaintiff and then found a swelling and reduced with extrema tendernose; that about wrill the swelling was reduced and her limb was gradually getting better; that there was some induration of little blood vessels, discoloration due to little blood vessels bursting, a little respinent ever the obje, being a rougheming of periocteal surface where a little skin was off; that he saw plaintiff again, and that the limb was still tender, the blood vessels were visible; that the roughness in his opinion might subside, and it might not.

Dr. Harriest Alexander testified that she examined plaintiff's limb the tay before. he testified that she found on the tibia, known as the shin bone, a little color the center of the bone, a discoloration and a depression of the great of

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the bone: that the area of discolsration was probably one and a half inches wide and one inch long. The baid that in her spinion, what the salls "a stellate repture of the blood vessels" would probably be personent, but she did not think it was progressive, and that the roughening of the surface of the bone would be personent, but not progressive.

In view of the fact that this evidence fails to dissless any financial da age resulting to the plaintiff from the
injury received, ont in view of all the evidence as bereinbefore
out forth, we are of the spinion that the contention of the
appellant must be sustained. We think the man of \$350 will
components the appellan for the actual injury sustained, and if
the appellan will, within ten days, file a resittitur in the sum
of \$250, the judgment will be affirmed, otherwise it will be
reversed and remarded.

ADVIAGED ON ANDIFFRIDE.

Dover, F. J., and Medurely, J., opnour.

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manufacture and particular part of present

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appellant,

VS.

C. T. FRYENAM,

Appellee.

MUNICIPAL COURT OF CHICAGO.

225 I.A. 655

MR. JUNTICE MATCHETT DELIVERED THE OFFICE OF THE STURY.

This is an appeal by the plaintiff below from a judgment entered on the verdict of a jury. Flaintiff must on a lease which contained authority to confess judgment, and under that authority the consed judgment to be confessed for the month of Nevesber, 1920, for the mon of 200 for rest, and 220 for atterney's fees. A motion to vacate the judgment was entered and supported an affidevit, which appellent has failed to abstract.

The affidavit admitted the execution of the lease upon which suit was brought and states that the defendant task possession of the previous October 1, 1900, and paid cent for that month; that one work after he so took powerion, his wife hing on the private back perch of their apartment come baby dispers: that the plaintiff requested that these be removed. and upon the failure to remove them, abo, on Cotaber 9, 1995, notified the defendant that the plaintiff had terminated badd lease, and requested the defendant to untropier pussecular of the premises; that on October 11, 1930, the plaintiff filed in the hamisiand Court of Chicago, a complaint in foreible outry and detainer, alleging that pinintiff our lawfully untitled to the possession of the opertment, and that affiant was unlawfully withholding the ame from her; that turnous lawed and the lit was served: that the defendant employed counsel and caused his appearance to be entered in the case; that on the return day of the assessment the cause was continued and set for bearing on laverbay d. 1920;

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part of the control of the last last the control of the

that negotiations were opened up between the attorney for plaintiff (who was also her husband) and the tefendant, through his
attorneys, and that plaintiff through her attorney made a
proposition that if defendant would vacate the procises, she
would dismiss the suit, rancel the lease and release the defendant
from future liability; that this proposition was assepted, and
that on October 50, 1900, a written natice was served on the plaintiff, stating that defendant had vacated the promises; that on
Detabor 31st the plaintiff autored into possession of the premises,
and on Bovember 1st, by her elterney, appeared in open sourt, and
caused the pending out too be dimmissed.

the effect that if estable as made in any of the expensive, the leaser might, althout notice, declare the term under and re-enter the demined premises. The judgment was thereupon set notice and the course submitted to the jury on the issues so thus made.

The plaintiff upon trial, called the defendant as a witmost and identified the lasse, then offered the lasse is evidence,
and rested. Thereupon Figur J. Phillips was called as a witness
on behalf of the defendant, and gave testimony which is substance
sustained the material allegations of fact contained in the
affidavit.

Mr. Brand, who was also acting as one of the attorneye for his wife, was then called as a witness in behalf of the plaintiff, and testified in general despine these statements of feet. He says that the forcible entry out was dismissed because the parties had moved out, but denies any agreement by which they were to do so. In seems to be the contention of the appellant that the lease offered in exitance, make a prime factor case for the plaintiff; that the harden was upon the defendant to evercome the case made by testimony, and that, because one witness

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testified one may, and the other another, the defendant failed to prove his defence by a proposderance of the evidence.

That the lease made a prime facto case for the plaintiff is undoubtedly true, and that the burden was on defendent to
everseme it by evidence, is also true, but it by no means follows
that because one witness testified one way and the other another,
that the jury were bound to find in favor of the plaintiff. It
is for the jury to weigh the evidence, and as was well said in
Conway v. Tity of Chicago, 219 Ill. 295, "the evidence is weighed
and not counted."

The jury in this case had a right, and indeed it was their duty, to take into consideration the fact that the only witness for plaintiff was her husband and an afternor trying the case; and the practice of an atterney at less taking part in the trial of a cause and at the same time appearing as a vitrous in it has been severely criticised by the courte.

It is elementary that the prepanderance of the cylinder is not alone determined by the number of witherence terrifying, but that the jury may and should consider not only the number of with nesses, but their interest or look of interest; their arrestones upon the stand; their knowledge concerning the things frost which they testify, and the reasonablement and the probability of the things to which they testify, etc.

We think on the record, the jury was justified in returning the verdict and the court in entering judgment upon it. The judgment is effirmed.

AFFIRMAD.

Dever, P. J., and McGurely, J., conour.

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WIN.

JOHN T. DOODLE et al. . Appellante. (PERAL FROM CINCUIT COURT OF COOK COURTS.

225 LA. 655°

Mas quite.

case to the Supreme court on the ground that a freehold was involved, which motion was decided. After further consideration we have concluded that we were in error to denying said motion, that a freehold is involved and the cause should be transferred to the impreme wourt.

impression that complainment's bill seaght only to establish his right to redoom from a foreclosure cale which had already taken place under the former and the present statutory practice where such sales are made shortly after decree subject to the right to redoom within fifteen months thereafter. In such cases it has been held that a freehold is not involved because the sward of a right to redoom is coupled with conditions which may or may not be performed, and the decree door not necessarily result in the gain of one party and the loss of the other of the freehold tenate. It was a set of the other of the freehold tenate. It was a set of the other of the freehold tenate. It was a set of the other of the freehold.

We had overlooked the fact, if it was sugmested, that the sale is the present case was under the statute in force July 1, 1917, which provided that the sale shall be after the expiration of fifteen wouths from the date of the first certificate. Illinois laws, 1917, Callaghan, pages 1193 to 1198. A sale under this

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statute is not made subject to the right of any equity of redesption, but much right is thereby barred.

Compleinant's bill is not seeking so much to establish a right to redeem as to establish the fact that he had already done all those things required by law to be done to entitle him to a certificate of race stion, roled the dectar improperly refused to leave.

The bill also seeks to set aside the male and the Ecotor's deed as void on the ground that the judgment creditor under when rade plies one and was not a judgment creditor within the meaning of the statute and therefore said redesption was mall and void. But the Master's sale and dood based upon this judgment were mall and void.

It is also charged that the Master's cale and deed are voil because of failure to observe cortain statutory resolvances. Thould these allegations ultimately prevail it would necessarily result in the gain of one party and the less of the other of the freehold entate.

As the Supreme court has exclusive jurisdiction on appeal of such case, an order will be entered transferring this case to the Supreme court of this State.

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Opinion filed May 17, 1922.

11 - 26698

LHON H. WALLMAN.

Defendunt in Error.

BERER TO

MUNICIPAL CURT OF CHICAGO.

WILLIAM MeGUFFIN.

Plaintiff in Error.

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MR. PRESIDING JUSTICE C'CONSCR delivered the opinion of the court.

on September 27, 1920, a judgment by confession was entered in favor of plaintiff and against the defendant ant for \$225.00. On October 21, 1920, the defendant moved the court to vacate and set aside the judgment which motion was entered, and the court erdered that the judgment be opened and leave given the defendant to file an affidevit of merits within five days. The affidavit was filed and subsequently, on November 29, 1920, on motion of plaintiff, the affidavit of merits was stricken from the files on the ground that it did not set up a defense as a matter of law. Thereupen the court vacated and set aside the older entered on October 21, 1920, opening up the judgment, and decied the motion to vacate the judgment. From this the defendant prosecutes this writ of error.

Plaintiff's claim was for rent due under a written lease. The affidavit of merits which was stricken set up that the defendant had a good defense to the whole of plaintiff's claim. The lease demised the premises to the defendant from October 1, 1919, until September 30, 1920, and the defense sought to be set up in the affidavit of merits was



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that the defendent had surrendered the premises on June 14. 1920. Plaintiff's claim wer for rent for the months of June, July and August, 1920. The affidavit of merits, so far as material, set up "that on or about the 15th day of April, 1920, plaintiff verbally agreed to the cancellation of said lease on two weeks' notice and payment of rent for the period of occupancy, and that on June 14, 1920, defendant, relying upon said agreement and after giving two weeks' notice of his intention, vacated and surrendered the premises to the plaintiff who immediately took possession of same." The affidavit of merits further set up that on June 9. 1920, defendent sent a check for \$37.50 to the plaintiff in payment of rent to June 15. "together with a letter again stating that defendant would vecate said presises June 14. 1920, purmant to agreement, which check and letter were received and retained by the said plaintiff without pretest until July 10. 1920." The affidavit further set up that between June 15 and September 1, 1920, plaintiff had many opportunities to re-rent the premises but refused to do so for a less rental than \$100.00 per month.

under a lease under seal may be surrendered, and that this may be shown by parel testimony. Alsohuler v. Makiff. 164

111. 298. But we think the affidavit was insufficient and, therefore, properly stricken because it does not state facts, but merely conclusions, and this too even though we construe it more liberally in favor of the defendant than under the practice that obtained at common law. The affidavit says that the plaintiff verbally agreed to the cancellation of the lease, and that the defendant vacated and surrendered

med on arriance has been retired but presented the stand II. THE CHAPTER STORY OF THE PART OF THE P APLIES IN PROBLETS OF SHEET ARRESTS NOT THE WORK BALL SECURE AND ADDRESS OF THE PERSON OF THE PERS or well, the plant country the best by the latter of the latter before the second second state of the second THE RESIDENCE OF SHORT AND ADDRESS OF THE PARTY AND ADDRESS. and purpose over the control of the - William Street and the state of third and the state of and the same of th CONTRACTOR OF STREET OF STREET OF STREET, STRE STATE OF THE PARTY ing a control of the property of the first p engan perupakan bahan dan pulah pelangan kelanggapan dianggapan beranggapan di interest based of Thirteen Comments of Sandato Commentations the cardenies of the Helling of Marchall Albania States gas, six different growing, he hope a first the design of the Part of the second of the seco

the premines to the plaintiff after giving two weeks notice. We see no reason why the defendant pollid not otate more facts in bie affidavit of morito, and no think the court were ontirely justified in helding it insufficient. But counted for the defendant say that the affidavit of merits contains the same allegations we those in the affidavit read in support of his motion to open up the judgment and which motion was allowed by Judge Wells. An examination, however, of the affidavit read before Judge Wells, as it appears in the files of the care in the Municipal Court, does not sustain counsel's contention for in that affidavit the facts are fully and clearly sufficient while in the affidavit of merits only conclusions are set forth. Since the affidavit failed to state sufficient facts to show a surrender, the other matter set up in the afficavit becomes immeterial. Since the trial court held the efficient insufficient it was entirely proper to set aside the order opening up the judgment, and there is no morit in any of the other points arged by the defendant.

Demplaint is made that the order entered opening up the judgment was made by Judge Wells, while the order striking the affidavit and vacating the order entered by Judge Wells was entered by Judge Williams. It is pointed out that this was in violation of the rules of the Sunicipal Sourt. The rules are in no way before us in the record, and it has been repeatedly held that this court does not take judicial notice of the rules of the Municipal Sourt of Chicago. But in any event we think the matter was preparly before Judge Williams and there is no marit in the contention.

The judgment of the Municipal Sourt of Shicago is affirmed.

AFFIHMED.

ALLEGO SERVICES AND SERVICES TO SERVICE SERVICES AND SERV manufact and the Baseline of the owner, so he at the second of the light of the least of the one characterists of public at hethers, placers are ∍লাম, কার্থিন, নিক জন্মা ক্রিকিল কি, কিন্তু পাতিক নৌকিন্দুৰ্থিন হৈছিল। of the standard of the contract of the contrac was retain to the term of the section and the second sections of Common restrictions of sales many grassite any letter and any amount of the partiest made to that place it result to your fire ghilain fan kun jarra jarran beren, edinaf era ett 7e tefit ter the state of the state of the state of the same of THE RESIDENCE OF PERSONS AND ADDRESS OF THE PARTY OF THE en nefekt de jille et jen i, næ and en mengest i white white our comments are not an explicit problem. gott an our of the control of the fire NAME AND DESCRIPTION OF PERSONS ASSESSED. A STATE OF THE PARTY OF THE PAR Afternoon of the country of the larger through

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Opinion filed May 17, 1922.

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FRANK SCHUETZ.

Defonuant in tror,

BERGE 10

SUPERIOR COURT,

SOCK COUNTY.

V.

FRAME 3. TERDE, doing bestness as WINCHELL PRESS and CHICAGO ENGRAVIES COSPANY.

Plaintiffs in Treer.

SECULE OF C

MR. PRESIDES JUSTICE CONCR delivered the opinion of the court.

Plaintiff brought an action of reviewin against the defendant to recover one Dexter folding machine valued at 3425.00. The sheriff, under the writ, took the machine from the defendant and delivered it to the plaintiff. Upon a trial of the case the court directed the jury to find a verdict in favor of the plaintiff, which was accordingly done, to reverse which this writ of error is presecuted.

The evidence effered on behalf of plaintiff tended to show that on July 26 or 21, 1914, the sheriff, under an execution issued in another case, sold certain personal property to divers persons, and at that sale sold the Dexter folder to plaintiff for 4425.00. This appears from the sheriff's return of the execution. At the same time the sheriff gave that is termed a bill of sale or receipt to plaintiff for the \$425.00. The evidence further tends to show that immediately thereafter plaintiff for a mason or moving van to remove the folding machine, which appearently was in the possession of the defendant, but the defendant

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NAME AND ADDRESS OF TAXABLE PARTY.

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desired to be presented out to relation with \$2 per

refused to give it up; that on the next day plaintiff served a written demand on defendant demanding the folder. which demand was refused; that on the 4th of August following, the present replevia suit was brought. One witness testified on behalf of plaintiff. In addition to his testimony the execution, bill of cale or receipt, and the written demand above mentioned were received in evidence. Thereupon defendant called plaintiff as his witness, and after some preliminary questions, plaintiff was asked by counsel for defendant: "Did you on the 4th day of August . were you on the 4th day of August, 1914, the owner of the Bester Solder described hereis?" Objection was sustained to this question. Thereupon defendant's counsel asked: "Were you on that day entitled to the Bexter folder described in this affidavit for repleving " Objection was sustained to this question also. Counsel then stated to the court that he wanted to show that plaintiff at the time suit was brought was not the owner of the property and was not entitled to its possession. The court, however, refused to permit the above question to be answered. Afterwards the plaintiff was asked if he served notice on defendant demanding possession of the folder, to which objection was sustained. The witness was further asked if he ever paid the sheriff of Cook County \$425.00 for the folder. The witness answered, "I did not." Objection was made and sustained and the answer ctricken out, the court holding that the return of the sheriff on the execution could not be attacked in this manner.

permitted to make any defense to the case; that he did not have a fair trial, or any trial at all; that "there was not

THE PARTY AND POST OF THE PARTY OF THE PARTY OF THE PARTY. and the principle in the principle appoints on the labels and the district a 4. ជាស្ថិតន ជាស្មាញ + . ហែក សុវាសំ ១៤ ខែ ១៩ ខេស្ស ខ្លាំង ១៩ ១៩១ ១៩១៩ ប្រែក្រាម ម៉ែញ ១៩១៩ apricial three same and same as a second and second second second ត្រូវត្រាចមាន 1.10 នេះ ប្រកាស់ 15. ជា ជា 1. នៅ 1.15 ជាក្រៅ ស្ត្រា "ប្រែក្រាស់ ១៣ ជា បាន បាន មិន ប្រកាស់ 1.5 ជា eture set the part see a seem to led at lice see Line Line of September 2007 Intelligence Design Armed Ball ាក្រក្សាស្ថិត សេស៊ី ស្ថា រថ្នៃ។ ស្មា ជាសេស៊ីស្ថា ៤០០១៤៩៤៤៦ gri parita ner Miliata, pancisana gramining man mana Subject to the the term of the terms to the terms. and the groupe of the fill file of the said and the said become not initially birthed indigent make when Dellas Diames withoutself unprecing and/one sint of कार्य पुरुष देवत सामा हरता । वान वान वान विकास स्वार्ध प्रार्थित सामा । इ.स. and addressed. Printed by the first print and he hedge as indicate and present space will be brightness as the best of the best of the made with the Charleston come when on ancious art gards from after has the Wanghill Hill To Venes hill the last Dipartit and Fills beautiful to the control of the court and control of the filter face ាស្រីទី២២ សហគ្រីដែល នាស្រែកសហគុល ស្រី បុណ្យនេះដី។ ស្រុញ សមិក្សីស កម្មី ទៅស្រុសស្ ស.ការពេត មានជាក្រៀនថា ស្តា ១០ នេះ នេះសារ ស្រុកស្រុក ស៊ី នៃ ដូចមក្សា សុស្តា ទីមិនិនិយនិ 📗 THE DESCRIPTION OF THE PATRICL SECURITY STATES HER WHITEHAM Williams out that here at it happe suffers one seemfly art also AND THE PARK OF THE THE PARK OF THE PARK O The er of the domination of the property of the best finished and the second of the se Training on, it parts as a sufficient for the endingine so west as Angries I I A. G. Pality of the top of graduate at the

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a scintilla of evidence in this case that on the 4th day of August, 1914. Frank Schmetz was the owner or entitled to the possession of the property described in the officevit for replevin. " We think this contention cannot be sustained. The uncontradicted evidence was that plaintiff had bought the folder at the sheriff's sale and paid the sheriff for it on the 20th or 21st of July, 1914, and that immediately after the sale he endeavored to get possession of it from the defendant, but that the defendant refused to deliver it up; that afterwards, on the next day, he served a written demand for the machine on the defendant; that on the 4th of August following, about fifteen days after serving the demand, this suit was brought. This evidence was clearly sufficient. in the absence of anything to the contrary. to show that plaintiff was the owner and entitled to the possession of the folder on August 4, the date the suit was brought.

defendent to ask the questions propounded to the laintiff. as above set forth, although some of the questions called merely for conclusions of the witness, viz: as to whether plaintiff was the owner or entitled to the possession of the folder, which were ultimate questions to be decided. Yet we think it would have been better if the court had granted some latitude to the defendant in this regard. We have examined the record carefully and can find no evidence or offer of evidence that would indicate that the suit would result in any different judgment if there was a re-trial. When the court sustained objections to the questions above set out, counsel for defendant stated that he expected to show that when this suit was brought, the

DESCRIPTION OF THE PARTY OF THE and A D. H. S. C. L. Co. Phys. Rev. D 51 (1981) 540; No. of Spinster, Spinst THE REPORT OF THE PERSON NAMED IN THE PERSON N Albert his Vidilitie follow mildly by the free will THE PERSON NAMED IN COLUMN 2015 AND ADDRESS OF THE PERSON NAMED IN COLUM produced the law your countries to the set settle WITH THE RESIDENCE OF A PRINTED BY SAW SHE SHE THE RESIDENCE OF THE PARTY OF T ALTER A DESCRIPTION OF THE PART OF THE PAR the second production on the Division and and Second Rell STATE WITH YOUR BUILD THE CONTRACTOR VANDO. TO SEE mental and committee and advanced on the other lands will or appropriate our air printings for comment our air appropriate water the territory and street and the Philosoph And Yells AND REAL PROPERTY AND AND AND PERSONS ASSESSED. THE PARTY OF THE PARTY

plaintiff was not the owner or entitled to the possession of the folder, but how or by what evidence he expected to establish this he did not state. If defendant, as a matter of fact, had a good defense to the plaintiff's claim he was extremely secretive about the nature of it, and in the absence of a more specific offer of proof a reversal of the judgment would not be warranted. It appears that plaintiff bought this machine at a sheriff's sale and was clearly entitled to it and there is no effer of evidence or araument tending to show that plaintiff was not the owner or entitled to possession, or that the defendant had any claim whatever to the property. In these circumstances we think me would not be warranted in reversing the judgment so that a better record might be made. And although it is clear that d fendant was hampered in his endeavor to make a defense, we are of the opinion, upon a consideration of all the facts, that the judgment should not be reversed.

The judgment of the Superior Sourt of Sock County is affirmed.

AVVI NOD.

THOMSON AND TAYLOR, JJ. CONCUR.

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ATTEMPT OF STREET, W. Co. Str. Str.

Opinion filed May 17, 1922.

37 - 26976

THE PECTE OF THE STATE OF ILLIBOIS, OR rel. ANNA MALLS.

befendant in Mirer,

APPRAL FROM

MUNICIPAL COUNT

OF GRICAGE.

MIKE STABLEY.

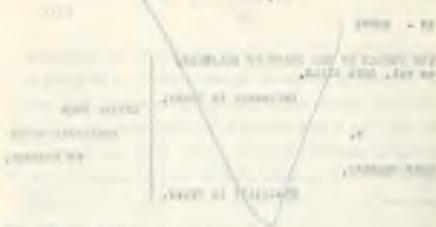
Plaintiff in Error.

225 I.A. 856

MR. PRYSIDING JUSTICE 6°00 SNOR delivered the opinion of the court.

This was a proceeding brought under the bastardy not whereby Mike Stanley was churged with being the father of the bastard child of Anna Sills, the relatrix, an unservied woman. At the close of all the evidence there was a distrected verdict finding that the defendant was the father of such child, and he was condemned to pay \$1100.00 for the support, maintenance and education of the child in accordance with the provisions of the statute, to reverse which defendant has sued out this writ of error.

The record discloses that on October 15, 1920, by
leave of sourt, a complaint was filed against the defendant
wherein it was averred that Anna Sille, an unmarried woman,
was pregnant with child, which would, by law, be deemed a
bastard, and that the defendant was the father of such child.
The next day a warrant was issued and on the following day
the defendant was arrested. On January 17, 1921, the case was
called for trial. All parties appeared in court, the defendant in person as well as by counsel. Thereupon on motion of
the People the trial of the case was postponed until February



205 I.A. N. 5 6

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16, 1921. The defendant was taken into sustody for failure to give bail. The exact date, however, does not appear, and afterwards on Fabruary 8. he was released upon giving bail. in February 18 when the case was called for trial the second time all parties were present, and the defendant appeared in person as well as by counsel, and upon his motion the trial was postponed until February 23, 1921. On the last mentioned date on amended complaint was filed setting up, inter glis that the child was born February 3, 1921. Then the case was called for trial the third time on February 23, 1921, the defendant again appeared in person as well as by counsel. Counsel. however, was not defendent's attorney of record, the latter being then engaged in the trial of a case in the federal sourt. A motion was made on behalf of defendant that the trial be continued for ten days when the defendant's counsel would be released from the trial in the federal court. The metion was denied, and a petition for change of venue was then presented on the ground that the judge was projudiced. The change of verme was denied and the case proceeded to trial. selected and evidence was introduced during the forences of February 23. The trial not being complated in the forencom the court adjourned until 2:30 o'clock in the afternoon. court convened at 2:30 and the State completed the presentation of its evidence. The attorney who appeared with defendant objected to proceeding with the case, and stated that he did not represent defendant and lack nothing about the facts in the eases that he had no connection with the attorney for defendant but had been requested by him to attend court and request that the case be continued. It further appears from the record. however, that the attorney who appeared with defendent on that day orous-examined the witnesses produced by the

Ass. 1922. 1974 to the transfer of the transfe the growth of the that great commence after a fed model and ofterersia on in ruley by marker rationary of \$3,550 mail religion was egan only good all evaluations as property personnel on the James and engine Ha sage TABLE THE MARRIED AND THE WAS A PARTY THAT AND THE PARTY AND THE PARTY. becilies for vit of alth all questry like breaton see till T . si . en tyllen a 1 % . en derektet bestelle en delektet THE REST CO. LEWIS CO. LANSING MY LINES AND PARTY AND PARTY. and the first of the property of the party and the first of the light which industrial the street or steel or dependently and the property of the street of with the printer to general or become the new parties after There was not not been as an entire with the profession while have tains out Just Assertation to Visite up also now mixture a largest <mark>សតិតិដី ខណៈដីកាល់ស្រាស់ និធីកាល់ស្រាស់ ស្រាស់សម្រាស់ស្រាស់សាល់ស្រាស់ ព្រះវិធី ស្រែស់សំដីឯកសម្រាប់</mark> ดาว การเกา indicative and a straight of the straight of t to the term of the companying the term along the last line to a test and num griff a giving to you soom to be east on the light first but but and To require the period of an energy of the two states to grammed to be thought and prime that saids and the grant spot •សម្រាប់ព្រះប្រជាជា មាន ប្រជាជ្រាស់ មាន សម្រេច ស្រែក ស្រ will at the control of the control o en in bull bushayan bin yanaban bili velebare adi ke keli the first of a second party of the state of the state of the second seco tament on dispose suffere entre consideration of the second section of the best terminated by The generalist has eithe motivation as as a configuration and will the property of the straightful frequency and the surface few markets in frequent that has most be freelighted, it harders reported from After an interest of persons of the passer plant of கர் நாட்டுகளும் அரும் பார்க்கு சரியிருக்கு இருந்து நாகு இரும்.

People and took an active part in the trial of the case on behalf of defendant. When the Feorle had closed its case counsel who appeared with defendant again stated that he had no witnessee nor any evidence to offer on behalf of defendant, so he knew nothing about the case. Thereupen it was discovered by the court that the defendant was not in court, and it appears that sometime during the scraing session, after the motions for continuance and for a change of wenue had been denied, the defendant disappeared and has not since been apprehended. When this was discovered, there being no evidence to be offered on behalf of defendant, the court directed the jury to return a verdict finding that defendant was the father of the child which was accordingly signed. Theroupon the court called the defendant and his surety, and neither of them appearing, a default was entered and the bond forfeited. The court entered judgment on the verdict and defendant was condemned to pay in installments the sum of \$1100.00 for the support and maintenance of the child.

printed argument states that for some days previous to the date of the trial Mr. Francis Borrelli, who was the atterney of record for defendant, had been actually engaged in the trial of a case in the District Sourt of the United States and was still so engaged at the time the case was called for trial February 23, 1921, and that "he was unable to appear before Judge Fisher because of this engagement, and requested Attorney Rush B. Johnson to appear before himand acquaint Judge Fisher with the fact of his actual engagement and sea set for a continuance of ten days, at which time he would have finished the case he was trying and proceed with the trial of this case."

and the father off of white avides the first of a good Transfer that I seem to the first test that the first test in the committee for the first the ing to any owings in a included the included and included the contract of the material by 1585 or an De of Buttille granton tribilla de THE REPORT OF THE PARTY AND THE PARTY OF THE PARTY. per un all less com la une fau tua finda in un est lui les exercentia with although party and palme builtens and agreets at the र रहे रहत्यक होता वर्ग ६ व. हे हैं। अन्य क्षेत्रिक्ट हेंबेट कर देखाँ केवल वर्ग करी है the street for a green were made to the second of the first to the also so that I want to be a seen and the west factorial war. instance from the selection of the selection of the selection of the second the transfer of the general designs a profess of part of នស្លាន ១៩៩៩ - ស្រែងក្រុងស ក្សីក្រុងនៃនិយាន។ សេស ១១៩៦ នៃដីដែក ខាង បិន to visities one playing and has because and deline become all-Death the learn to the tester are \$ Lorden a grisseages . To ner la como de dedicar con se serejué, en sére se un est mat gar o . mills to mar not might be and the gar or been then garan and a contraction for drawing

The statement further is that Attorney Johnson appeared before Judge Fisher and informed him of Mr. Borelli's engagement "and asked for a ten days' continuance" and that when this was denied Mr. Johnson asked that the case be continued until two o'clock in the afterneon of that day so as to enable the defendant to get another counsel, which metion was also denied.

It is first contended that the court erred in denying defendant's motion for a change of venue, and it is argued that since the petition for the change of venue was in proper form it was imperative that the court grant the prayer of the petition and change the venue of the case, and that since this was not done it was error to proceed with the trial. Of course, it is the law that where a petition for a change of venue is in proper form it is the duty of the trial judge to grant the prayer of the petition and that he has no discretion in the matter. But we think it clearly appears from the statement of counsel in his printed argument that the purpose of Attorney Johnson in appearing before Judge Fisher was to obtain a continuance of ten days until Mr. Borelli would have finished the trial of the case in the federal court. Indeed, this is what counsel for defendant state. This being true it appears that the petition for a change of venue was a mere subterfuge to gain a continuance which could not otherwise be obtained. In these circumstances we think it was not error to deny the change of neure. Morrover, no notice was served on the State's Attorney that the motion for a change of venue would be made, as provided for by the statute. Section 5, Ch. 146, Cabill's Statutes. And this want of notice was not waived although

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It is further contended that there was an abuse of judicial discretion by the trial judge in refusing to contimue the case when it appeared without contradiction that defendant's counsel of record was actually engaged in the trial of a case before another court. The record discloses that there were at least two continuances of the case, and on February 16, 1921, when the case was continued at the request of the defendant to February 23, 1921, the trial judge expressly stated to ocunsel for the defendant that if counsel was still engaged in the trial of the case in the federal court on February 23, he would not grant him any further centinuance but that the defendant should obtain other counsel. Of course, the case could not be continued indefinitely on engagement of counsel. The matter involved was simple. Any attorney of ordinary ability could in a few days prepare and try defendant's case. since it appears that the court expressly stated on February 16 that the case would not be continued beyond February 23, and since there was no apparent reason why on February 16 it could not reasonably be accertained that counsel would still be engaged in the federal court, it then became the duty of the defendant to arrange for other counsel in ample time to have his care properly presented on February 23. This defendant failed to do, addupen a careful consideration of the record we cannot say that the court was not acting within his judicial discretion in denying a further continuance.

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It is next contended that the court was in error in directing the jury to find that the defendant was the father of the child. In support of this it is argued that section 4, ch. 37, R.S. provides that where a person is charged, as in the instant case, the court shall cause an issue to be made up whather the person is the real father of the child, and that such issue shall be tried by a jury: that since a bastardy proceeding is quesi-criminal in its nature, and since section 12, ch. 171, Cahill's Statutes, provides that no person shall be imprisoned for non-payment of a fine or judgment in civil, criminal, quasi-criminal, or qui tam actions except upon conviction by a jury, it was error to give this instruction directing the verdict We think the point is untenable, and whether the section last referred to was pertinent to the case, it may be said that since the filing of the briefs in this case the Supreme Court of this State has declared that section of the statute unconstitutional. Sturges Burn If a. Co. v. Pastel, 301 111. 253. Presecutions under the basterdy not are civil and not criminal, although oriminal in form. Scharf v. People, 134 Ill. 240. Such proceeding is not designed as a punishment of the defendant, but is for the purpose of providing support and maintenance for the shild to prevent it from becoming a mublic charge. Feeple v. Ciemeniecki, 221 Ill. App. 275. Such proceedings being civil in their nature, the jury decide only questions of fact, and questions of law are for the determination of the court.

In the case of a motion for a directed verdict the question is one of law and is properly addressed to the

To be in Agree of seda but some as a sea at or the property of the part of Land to the second of the second and abide one is to be a land mi origin or no comi embigator . . A . Et . to . E estimate ្រុំ ក្រុងស្រុក ដូចនៃស្រុក ស្រុក ស្រុក ស្រុក ស្រែកស្រុក ស្រែកស្រុក ស្រុក ស្តិស ស្រុក ស្តិស ស្រុក a ter for and all approve and produce on anger of all approve of the sells, and that with land shall in letter by a form tak mi fewlaterwinder al medicapour gindless' a media fadi AND THE PROPERTY AND THE AND THE PROPERTY OF LITTLE AND THE PROPERTY OF THE PR to a present the transferral and file greater as total actives a afternoon-order absolute all the of Discount to said at the or only to anti-ne energy upon rearisting he a fare, it the lease of the entransminister of the same of traction, and padd to the production of terr and finish at Last retrieve to two portuged. It the mare, it was beor a serie marks of attempts on a goodfile end opening south black THE OWNERS AND ADDRESS OF WHICH ADDRESS OF PERSONS THE of all additional recently. Installed the come withhalf and the plant of the second second second with the lift, and as lementer age visio , invinue too bee divin one to the guide about more . The gill bol gale and up trad tot the principle granticated and by investment a section. red call recognitions have President building for employed ្រាច់ប្រែក្រា មន្តិសុខភាព ន ក្រុមនេះសេខ១០ ២៤១៧ និង ជាក្រុមសេខណ្ឌ ស្ថិតស៊ីប Finish and Dr. . 18. . . 18. . ISE FOR , transference to being eful) to their to early the jury that andy our Alves on to bell

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court, which may direct a verdict for either party. A verdict for the plaintiff may be directed if a cause of action has been legally established and no defense appears. People v. Zurek. 277 Ill. 621. Eince there was no dispute in the evidence, and since no reasonable conclusion could be drawn therefrom except that the defendant was the father of the child, the court properly directed the verdict. There was no question of fact to be determined by the jury.

It is further contended that the judgment is fatally defective because the record shows that no issue was made up as required by the statute and, therefore, there was nothing before the court upon which a trial could properly be had. We think this is a misapprehension of the state of the record. The record discloses that the matter came on for hearing, the People being represented by the State's Attorney, and the defendant in his own proper person as well as by counsel, "and now isome being joined herein" it was ordered that a jury come. etc. Formal pleadings are not required in hastardy proceedings, and since the record states that the issues were made up, we think the point made is not well taken, and that the court did not err in proceeding with the trial. Moreover, whatever error, if any, there may be in the record, we think the defendant is in no position to complain, because it appeared that during the progress of the trial he disappeared from the court room and has not since appeared or been apprehended. In these circumstances we think the court properly entered judgment on the verdict.

The judgment of the Municipal Court of Chicago is affirmed. AFFIRMED.

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ed common and daily abbuilding to the ELM THE RESIDENCE AND ADDRESS OF THE PARTY OF TH and the state of t THE RESTRICT AND THE PARTY AND THE PARTY AND THE ្នាស់ស្នាស់ស្នាស់ស្ត្រីស្តេស្ត្រី ស្នាស់ នៅ ស្រែស្នាស់ នៅ ស្ថិស្តាស់ ស្ត្រីស្តាស់ ស្ត្រីស្តាស់ស្ត្រី ស្ត្រីស្ ામ . . તેમ સામાલકોલ્ટાઓ સાથારાજી અનો વારાવાલ લાકો ઉંજી પહોંચી જાઈ જાઈ DESCRIPTION OF THE SHOPE OF THE PARTY PARTY TO THE PARTY NAMED IN which is that has been been the the Angelland a factor of the solder that was a reflected in the form on active the and the property and the second second and the feet and deployed deployed the feet and the feet SHIPL WE AND NOT THE PARTY HAVE BEEN THE PARTY HERE. sour or room to resigned a filter was the proceedings and markula a grupus kalu lafakta inti mulut baski memili ak remi saa er. west as the state of the set of the tenth of the second អមារាជា និង មួយ ខ្លាំ រូវសម្រើការមេ ស្តី ត្រូវសម្រើ ស្រាស់សមារិក្សា . The superior of the second s characterism and its his construction will be and also apply fingle rate produced of the emolytely benefits

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Opinion filed May 17, 1922,

64-27013

A. J. CAPON, doing business as the Aard Class Company,

Arreal from

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Municipal Court

UNITED STATES BREWING COM-PANY OF CHICAGO, a correction, of Chicago.

of the court. 225 I.A. 6582

Plaintiff brought ault against defendant to recover damages claimed to have been sustained by reason of the failure of the defendant to deliver to plaintiff certain mirrors which the plaintiff and purchased. The case was tried before the court and there was a finding and judgment in plaintiff a favor for \$198.76. Plaintiff being dissatisfied with the amount of the judgment prosecutes this appeal and centands that waisr the evidence he was entitled to secover \$3914.50, and take this court to enter judgment in his favor for that smount here.

The record discloses that plaintiff in his original statement of claim was seeking to recover \$3513.33, and by the amended statement of claim, \$3582.44. It was plaintiff's contention that he purchaser from the defendant certain second-hand mirrors for a specified price; that at the time of the purchase he paid \$1000.00 on account; that only a small portion of the mirrors were delivered to him, and that the defendant refused to deliver the balance, as a result of which plaintiff sustained damages, the amount of the damages being the difference between the purchase price and the market price.

Cpinion Tiled ...!". 700 SECTION OF STREET of the supplied of the last THE APPLE or supplied where a little of the little of crime next le cal Public Screening - - - Transfer of the second A STATE OF THE PARTY OF THE PAR

The judgment entered was for the balance of the \$1000.00 paid by plaintiff after seauction had been made for the mirrors delivered. A number of points are made and argued by both sides, all of which have been carefully considered, but in the view we take of the case it will be necessary to discuss but one.

We think claimsiff has failed to prove that he was demaged, even if we assume, as we do for the purpose of this decision, that he proved every other contention made by him. Plaintiff offered evidence tending to show that the mirrors were of two sizes; that for the large sizes he nerged to pay 720 per square foot, and for the emeller pices 50¢ per square foot. He further offered evidence tending to establish the musber of square feet of each size. To prove the amount of his damages plaintiff offered three sitnesses, Samuel Cohn, A. J. Caron and W. V. Hart. Samuel Cohn testified that the fair, reasonable, cash market value of similar mirrors at the vine in question was \$5.26 per square foot. Caron placed the value at from \$2.00 to \$2.00, and Hart from \$1.50 to over \$3.00 per equare foot. These were all the mitnesses that tentified on that subject. Cohn was an employee of the plaintiff, Caron, and on prossexemination he testified that he had been in the business of handling mirrors for about 15 years; that he had made the contract in question between the parties; that he made a number of similar purchases about the time that he purchased the mirrors in question, probably making a deal about once a month. He further testified that at the time he surchased the mirrors in question, and for which plaintiff was to pay 78¢ per square foot, their market value was \$8.20 per square

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Foot; that he made five or six other purchases during the month of October, 1919, the time in question, from other parties of similar migrors for which he paid from 70¢ to 73¢ per square foot. A. J. Caron, the plvintiff, after testifying that the reasonable market price in October, 1919, was \$2.00 to \$3.80 per square foot for similar migrors, testified that he made other purchases in October, 1919, for 73¢ per square foot.

From the foregoing it clearly appears, without contradiction, from the testimony of plaintiff's witnesses, that plaintiff was buying similar mirrors in the open market from other parties, at the time he bought the mirrors in question, at a price of 70¢ to 72¢ per square foot, several of such purchases being made. In these eiropastances, of course, the market price of such mirrors would be from 70% to 78¢ per square foot and not from \$3.00 to \$7.80 per square fact as plaintiff and his situessen testified. There is nothing in the record that in any way would indicate that these purchases made by the plaintill from other parties were not made in the usual and ordinary course of business in the open market. It appears, therefore, that plaintiff was in no way damaged by the action of the defendant in refusing to deliver the balance of the missers to him. It follows from this that the trial judge was justified in entering judgment for \$198.76, the balance of the \$1000.00 remaining in defendent's bands, and the judgment must, therefore, be affirmed.

Opinion filed May 17, 1922.

JEARY VITER.

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JACQUES TOHELEBIAN.

Apreal from

Circuit Court,

Cook County.

MR. PRESIDING JUSTICE O'CONTOR delivered the opinion of the court.

Plaintiff brought suit against defendant to recover demages for personal injuries. There was a verdist and judgment in his fevor for \$3661.00. to reverse which defendent prosecutes this acresl.

The record discloses that on February 11, 1917, at about one o'clock in the afternoon, plaintiff was driving east on With Street. He drove a horse to an open wagon and had been delivering milk, butter and aggs. He turned the horse south to drive into a north and south alley and as the horse was proceeding into the alley a seven passenger lisousine automobile, driven by a servant of the defendant, struck the right hind wheel of plaintiff's wagon, threw plaintiff off the seat onto the ground and he was severely and permanently injured.

There is no complaint that the judgment is excessive, nor is any complaint made as to the ruling of the court in in e admission or exclusion of evidence, nor sa to the instructions The only contention is that the evidence shows that the defendant was not guilty of any negligence in the driving of the automobile, but that it appeared from the syldense that plaintiff was injured as a result of his con negligence; that both vehicles were traveling oner and that plaintiff suddenly and without warning turned his horse to the south in the pathway of the automobile and that it was impossible for

Opinion filed May 17, 1922.

and the same of th THE RESERVE OF THE PARTY OF THE the same of the sa The second of the sub-representation The second second second second the contract was proved a first book to be been been and the second s

defendant to prevent the oclision.

The evidence shows that on the day in question the weather was extremely cold and the street was icy and slippery; that it was a bright clear day and that there were no other vehicles in the street except the two here involved; that in the automobile at the time in question there were five persons besides the driver and that they were requesting from a funeral. The persons in the misomobile besides the chanfleur were Mos. Esward Tisfonshal, her husband, Mrs. Joseph Rosensweig. on must of the latter, and a semil boy. The evidence tends to show that as a result of the collision plaintiff was thrown off the seat of the milk sagon onto the pavement and rendered unconscious; that the automobile stepped and the ladies not out and substruently bourded a street car and went home. man put plaintiff in the automobile to take him to a hospital but after they drove a block or two plaintiff insisted on getting out of the automobils and going home, stating that he was not injured. Thereugen he alighted from the automobile and the driver dreve home. Shortly afterward plaintiff's acighber found him wandering in the street apparently unaware of his condition. The neighbor took him home and he was confined to his bed for a considerable period of time.

Plaintiff thetified that the day in question was very cold; that he was driving an open wagen with a high seat in front; that he had on an overcost and a can over his case; that he was driving in the south or east-bound car track, there being two car tracks in the street; that shen he approached the alley which was in the rear of his home, he turned to the south but did not look behind to see if any

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and the second s the party of the p the period of the second property and all period off and the second second section and the section and the second section and the section and and the state of the state of the state of the state of provide the Printerson State of the Paper Land Address The second secon the same of the same of the continuous THE RESERVE AND ADDRESS OF THE PARTY OF THE THE RESERVE OF THE PARTY OF THE the same and the same areas and the same are the particular and THE RESERVE THE PARTY OF THE PA AND COMPANY OF THE PARTY OF THE and the same of the blanch and the same of the blanch

vehicle was approaching from that direction; that he had no recollection of any collision or accident, but the first he recalled was that he was none in bed some time afterwards.

From his testimony it appears that he was somewhat desed and did not recall the facts of the case.

Joseph J. Lambersky, a witness for plaintiff, testified that at the time in question he lived and conducted a store on the south side of 86th street and immediately east of the alley, and that he saw the accident; that he lived upstairs and conducted the store on the first floor; that it was Sunday and that his store was closed, but that he was arranging some of his goods in the show window. He further testified that he was neighbor of plaintiff and know his for eight or nine years; that plaintiff was driving east on 26th Street in the south street par track, the horse going at a trot or fact walk; that before turning into the alley plaintiff looked back from both sides of the vegon to see if anything was approaching: that by the time the horse and warm were halfway into the alley the automobile came sant at thee rate of about 35 miles per hour and atrack the right hind wheel of the wagen, throwing the wagen over against a telephone pole located at the east side of the alley on the south side of 25th Street; that the hind wheel of the wagon was broken, plaintiff thrown to the ground, and the butter, eggs and milk scattered; that he left his store and went out into the atreet to see what had happened; that the unbomobile stopped and two or three men got out, put plaintiff in the machine and said they were going to a hospital; that after plaintiff fall he remained lying on the ground and appeared to be unconscious; that he did not see any women get out of the automobile. He

and the second s the same of the sa management or our process on the period on applied and if have proved and on accounting artificiation MARRIED THE THE THE COURT OF THE REST TO THE THE THE PERSON. ALTONOMIC TO A CONTROL OF THE PARTY OF THE P to this colonial and the William I is reduced on all field the trust on manife to close the day of The first of the parties of the part are preferred to the property of the professional date and date the concessor in most not only on an year partnerson to the case of the contrast of the contrast of the last two trains for health the contract of the 60 hands that make your in Particular with Daylor All Sufficients among to this own oil or note oil to talk decision in Ashrell the same of the same of the transfer of the same of n, di, a semi nomi dan an in ezzi din da di and the standard Market and Stade to a New York and the world of the Court n mile sear to refresh militaria Compared to the c The state of the s

further testified that the automobile had akid chains on and that he saw from the marks on the ice on the street that it had skidded a distance of about 75 feet along the south side and over the south ourb of 18th Street; that the alley is question was midway between South Springfield Avenue on the out and Harding Avenue on the west, both north and south streets

For the defendant Mrs. Tiefenthal testified that they were returning from a funeral; that she know there was an accident on 26th Street because the automobile hit something and stopped; that she immediately got out and saw that a man was injured; that she and the other ladies got into a passing street car and went home; that the automobile seemed to atop immediately when it struck the sugon; that she did not know shether the automobile was running fast or not; that she paid no particular attention to that matter. Mrs. Resenancia testified that the first thing she knew the automobile hit a dagon; that one had been telking to some of the other ladies; that the wagon turned over and the men was thrown from the seat; that she did not remember what part of the wagen the autombile struck; that after the collision the Wagon was partly in the alley and partly in the street, the exact location of which she could not give. She did not recall whether the automobils was going fact or slow. Harry Aktarian, the chunffeur, testified for the defendant that he drove the automobile in question; that he had been driving in Chicago eince 1910; that ut the time in question he was returning from a cometery; that he turned into 28th Street at Crawford Avenue, which is one block west of Harding Avenue; that he was driving on the south side of the street south of the street car tracks; that he first sur the milk wagon shen it was

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the second secon the second control of the second conthe second contract of the second contract of the second secon the second secon the same of the sa and the same of th the second secon - The second sec The same of the sa - the strain of the same and th en de la companya de et grant to the comment of the second and the second of the second o the same of the sa THE RESERVE OF THE PARTY OF THE manufactured by the same of th before the second points in the pass on an indicathe state of the same of the s

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about a block sheed of him; that it was then driving on the north side of the street car tracks; that the situess was driving his machine it about 10 or 18 miles per hour; that when the automobile was about five feet west of the alley plaintial swung his horse directly in the path of the sutomobils: that the witness is educately sounded his horn and arried the brakes, but that it was too late to avoid the collision and that the automobile struck the wagon and pushed it over against a telephone pole at the corner of the alloy and the south side of the street; that the witness in an endeavor to avoid a collision turned his machine charply to the south and thought he could avoid a collision by rusning south in the alley but that it was too narrow; that he insediately stepped the automobile, got out, put the men in the automobile to take him to a hospital, and that the ladies left and went home; that it was impossible for the eitness to avoid the collision on account of the plaintiff terming vithout varning in the path of the machine, and that after the accident he drove his machine off the south street car track to permit a street car to pass. This is substantially all the material evidence in the case.

Plaintiff's position is that the evidence shows that he automobile sas driven south in Harding Avenue at a rapid rate of apost and turned east in 26th Street, but on account of the speed it run over the south ourb before the driver could make the turn, and in this way atruck the vagon as it was going into the altey. This is not borne out by the evidence. There is not a word of evidence in the record as to whether the automobile came from the north or the south into 26th Street, and there is no evidence that it turned east on 36th

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Street at Harding Avenue. The only sitness she touched on this question was the chanifour. He testified that he was coming from a semetery; that son 88th I turned, on Granford I turned on Soth, I was going on 28th right in my may on the south side of the street our line." While the evidence door nos ches the exect distance between Harding Avenue and Orasford Avenue, so think it endicionally appears that Crawford Avenue is a north and south atrest and one black west of Harding Avenue. If the automobile turned into 58th Street at Gradford, as the driver testilized, the admissme and not docur in the manner plaintiff contends. However, we do not bolieve that all resonable minds sould reach the conclusion that the accident would not have har ened except for the fact that plaintiff burned sharply and without warning, in the path of the automobile, and in those diroumstances it was a question of fact for the determination of the jury. Libby. McNeil & Libby vs. Cook, 222 Iil. 208. The evidence tends se show that the sutomobile struck the hind wheel of the wagon when the horse and part of the sugar were in the alicy. This buing true, the horse and wagon could not have turned charply in front of the path of the automobile as defendant contends, but it must have turned when the automobile was a considerable Sistance from the wagon. In these dirematences we think the question was a proper one for the jury.

It fellows, therefore, that the judgment of the Circuit Court of Book County sust be affirmed.

AFFIRMED.

THOUSON and TAYLOR, JJ. concur.

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Opinion filed May 17, 1922. BULL & MOURLE COMPANY, a corp. Appellant. APPEAL FROM MUNICIPAL COURT

GMORGE K. SPOOR Appeller.

259 - 26453

MR. JUSTICE TAYLOR delivered the opinion of the court.

The cause was consolidated with Bell and Howell Company v. Speer, General Humber 2643My for hearing. We have ennounced our opinion in General Tumber 26432, and therein set forth the facts and the law which in our judge ment was applicable.

The trial judge, in the instant case, found that the plaintiff was entitled to recover royalties up to totober 15, 1917, the date of the alleged assignment, amounting to \$6416.67 and interest and entered judgment therefor. That was done apparently on the theory that the centract of May 1, 1915, was binding, but only up to (ctober 15, 1917. fer the reasons, however, which we have set forth in our opinion in Bell and Newell V. Spoor, General Mumber 26432, the trial judge erred, and the above mentioned judgment must be modified. Judgment will be entered here; in the instant case, in favor of Bell and Novell Company and against Spoor, for the three installments of royalties, due Cotober 31, 1917, January 31 and spril 30, 1918, being \$21,000.00 plus interest at five

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per cent from June 30, 1918, to date, in all \$25.074.58. together with costs.

JUGGORY NOMET D.

O'GONBOR, P.J. AND THOMSON, J. CONCUR.

Mr.

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309 - 26483

Opinion filed May 17, 1922,

BYLL AND HOWELL COMPANY.

Appellee.

AFFRAL FROM

MUNICIPAL OCURT

OF CHICAGO.

aronou R. : Feen.

Appellant.

225 I.A. 657

AR. JUSTICE TATION delivered the opinion of the court.

In this cause the plaintiff, Bell and Nowell Company, brought suit in the Municipal Court to recover an installment of royalty in the sum of \$7,000.00, which it is claimed become due on July 31, 1917.

The trial judge held that the adjudication in Bell and fewall Icopany v. Spoor. 216 Ill. App. 221, "conclusively adjudged and determined that the contract sued on is this case was entered into between the plaintiff and the defendant for an adequate consideration; that the defendant. Seeing f. Speer. is estopped by the judgment and records in the said former suit from showing a went of consideration for said contract." that Spoor was estopped from showing that the patents or applications were void or invalid, or infringed the Schneider or any other patent, and entered judgment in the sum of \$8020.83 in favor of the plaintiff. This appeal is therefrom.

All the contentions made by counsel for the defende ant we have already considered in Ball and Newell Company v. enther this mar 12, 191,

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insor. General Sumber 26432. What we have stated there is decisive of this case. The judgment, therefore, will be affirmed.

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O'COMBOR, P.J. AND THURSON, J. CONCUR.

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Opinion filed May 17, 1922.

BELL AND HOWELL COMPANY.

a corp..

Appellee.

Appellee.

Bunicipal court

OF CHICAGO.

225 I.A. 657

MR. JUSTICE TAYLOR delivered the opinion of the court.

In this cause the plaintiff. Bell and Howell Company, brought suit in the Eunicipal Court to recover an installment of royalty in the sum of \$7,000.00, which it is claimed became due on April 30, 1917.

Bell and Howell Company v. Apoer, 216 111. App. s21, "conclusively adjudged and determined that the contract sund on in this case was entered into between the plaintiff and the defendant for an adequate consideration; that the defendant and records in the said former suit from showing a went of consideration for said contract", that Spoor was estopped from showing that the patents or applications were void or invalid, or infringed the Schneider or any other patent, and entered judgment in the sum of \$8137.50 in favor of the plaintiff. This appeal is therefrom.

All the contentions made by counsel for the defend-

Opinion f led May 17, 1922.

the statement between the state of the statement and the statement

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ant, we have already considered in Bell and Sowell Company v. Spoor, General Number 26432. What we have stated there is decisive of this case. The judgment, therefore, will be affirmed.

APPIRMID.

C'CLANOR, P.J. UND FROMHON, J. RONGUR.

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Opinion filed May 17, 1922.

270 - 26931

CSMUND VINJE, et al.

Aupellee.

APPOAL FROM

SUPERIOR COURT.

COCK COUNTY.

A.

JOSEPH SARLEY, et al. On appeal of Walter Pagles,

Appellant.

225 LA. 657

MR. JUSTICE TAYLOR delivered the opinion of the court.

filed a bill in the Superior Court to foreclose a chattel mortgage against the defendants.

The Sarleys, defendants, having given a chattel mortgage to the complainants, Vinjes, to secure \$1300.00 of notes, and having made default, this bill to foreclose was filed. The chancellar decreed a foreclosure.

The chattel mortgage which it is here sought to foreclose was involved and considered by this court in <u>Vinje</u> v.

Pagles. (General Number 25912). We there said. "On Wednesday,
December 17, 1919, the property described in the shattel mortgage, given by the Earleys, which included the leasehold intercet of the mortgagers in the premises * * * was sold at public
sale and bought in by tamund and Tivin Vinje, etc., and decided
that the Vinjes, by purchasing at the mortgage sale, became
entitled to obtain possession of the premises in a forcible
detainer proceeding.

Cpinion filed May 17, 1922.

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exercised the question then arises, what ground is there see for a foreclosure? A bill to foreclose does not lie unless there is property to be sequestered and sold to liquidate a debt.

Here, the Vinjes have exercised the power in the mortgage, have sold all the property it assoribed, and the selves have become the purchasers and jot such title to the lessehold interest that we held they were entitled to obtain possession in a forcible detainer suit.

As there are now no property rights left, which it is the particular function of a court of equity to take charge of, in order to assist in the liquidation of the indebtedness, there is no equitable jurisdiction available, and the creditor is restricted and relegated to his action at law. In other words, there is no right to a foreclosure in equity where there exists only a debt for which there is an adequate remedy at law.

When the mortgages in a chattel mortgage by reason of the default of the mortgagor exercises legally his right and power to sell, and a sale is made and the title passes, that instrument, then, as a mortgage, is functus officio, and will not support a suit to foreclose.

It was argued in the former case (Gen. No. 25912) on behalf of the Vinjes, for the purpose of establishing the right to an action for forcible detainer, that the sale of December 1919, gave them title to all the property described in the mortgage, and now, here, it is argued for them, that they should be allowed the aid of a court of equity to sequester for them that which they have admitted and urged, already be-

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longs to them. The two positions are irreconcilable.

Of course, what is said in Vansant v. Allen, 23 Ill.

30, is true, that "a creditor by note and mortgage has several remedies, either and all of which he may pursue until his debt is satisifed", that

"He may bring his action upon the note; or put himself in possession of the rents and profits by an ejectment after condition broken, or, if the mortgage be recorded, proceed by scire facias on the record and obtain a judgment to sell the land; or he may file his bill in chancery for a strict forecleaure of the equity of redemption, which courts will allow under a proper state of circumstances, or file a bill for foreelcoure and sale, which is the usual practice in this state. "That, "If the creditor obtains judgment on the note, a sale of the land under the execution is a sale only of the equity of redemption, and the money raised by the sale is satisfaction of the nortgage pro tanto, and he may have ejectment against the purchaser upon the mortgage, if he does not himself become the purchaser if the mortgage is not fully satisfied." That, "A judgment on the note, without satisfaction, is no bar to a proceeding in equity to foreclose, and the two suits may be pending at the same time.

Here, however, in the instant case the mortgage,

cus mortgage, was already exhausted and the property all sold,

and actually purchased by the Vinjes themselves.

We are of the opinion that the chancellor erred in taking jurisdiction of the bill to foreclose and entering a decree of foreclosure. The decree will be reversed and the bill dismissed for want of equity.

DECREE REVERSED AND SUIT DISHIBSAD.

O'SORNOR, P.J. AND THOMSON, J. CONCUR.

្នាត់ស្ត្រីវា មកក្រុមហាក់ (១ ១ ខុសានេសិស្សជាក់ ១២៤ នៅ) **រ**ូប្រាស់ពី ១**៤ ជាប្រាស្ត្**

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ក្សា ១០៩០ ប្រជុំតិចមាស់ខែ ១០០ វាសាស (១៤៤១០១៩) ខែ១០១០ ប្រឹ ស្ត្រាស់ ១០១ និងមសាស្ត្រ ១០១៩ នៃ ១០១១១១ ១០១១ «២០១៤២៤) និងមាសាស្ត្រិមមម្រើក ខែ១០១១៤៤ «១៤៤១១១ ១០១៩២៤៤៤ និង និងរៀវិធី

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Opinion filed May 17; 1922.

83 - 27033

BURADELLE DAWSON.

Defendant in Error.

ERRCH TO

SUPERICR OF MY,

COCK GOUNTY.

WDDIW WILLIAMS

Maintiff in Error.

220 i. H. D. 7

MR. JUSTIC: TAYLOR delivered the opinion of the court.

On August 29, 1919, the plaintiff, Euradelle Dawson. filed a practipe in the office of the clerk of the Superior court requesting the issuance of a summens in an action on the case against Eddie Villiams (the defendant) and one Feter M. Klein, returnable to the October term, A. D. 1919.

On the same day, a summons was issued and directed to the Sheriff of dock founty commanding him to succeen Williams and Flein to appear before the Superior court on the first day of the term which began the first Monday of Cotober, A.B. 1919.

The summons was duly served by the sheriff on the dofendant. Eddie Williams an Testember 1, 1919, both by reading and delivering a copy to him. The return as to Elein was "Not found in my County."

On Jenuary 15, 1921, the plaintiff, Buradelle Bawson, through her attorney filed a declaration alleging that while a passenger in a taxicab and being carried for hire to her destination, she was injured through the negligent driving of Williams. The ad damnum was \$5,000.00.

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ా కైబెట్ గు. ఇప్ జేప్లూ గ్రెక్క ఇం అంచాలం కాగా కులగాలుకోశవస్ శాశకుండి ఇదాను సహాగెశ్ కాగా మంగార్క్ నాక్ కారు మాగుల్ 2 కండ్ 2 మంగార్కి కార్స్ కార్స్ ని కైస్ట్స్ ని పైరాగార్క్ తెక్కిగా కుండా క

e stanka annel(jen en toer) neghjele et ent "kolanka ette ejää sek nommen ka nat "nees)kisj it appearing to the court that due personal service had been had on the defendant, Williams, for at least ten days before the first day of the term, the default of Williams was entered of record. That order recited "wherefore the plaintiff ought to have and recover of and from the defendant. Eddie Williams, her damages sustained herein by reason of the premises."

ney, it was ordered that all papers and proceedings in the cause be amended by discontinuing without costs as to the defendant Klein. And on the same day the assessment of the plaintiff's damages was referred to a jury and a verdict rendered as follows: "We the jury find the defendant guilty and assess the plaintiff's damages at the sum of twenty-five thousand dellars." Upon that verdict judgment in the sum of \$2500.00 was then entered.

On July 16, 1921, the record shows the following:
"Now on this day it is ordered that the defendant's motion to
Vacate and set aside the default and judgment heretofore
entered herein and quash the writ of execution issued in
said cause be and is hereby overruled and denied, to which
the defendant excepts."

The assignment of errors by counsel for the defend," ant is as follows:- (1) The court erred in entering the order of Jeren 22, 1921, which undertock to out the defendant, will-iars, in default, and in ordering an assessment of the plain-tiff's damages. (2) The court erred in entering the order of May 9, 1921, in calling a jury to assess the plaintiff's dam-

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 ages. (3) The court erred in entering judgment against the defendant. Williams, and (4) the court erred in overruling the defendant's motion to vacate the judgment and set aside the order of default.

It is contended by counsel for the defendant that where a defendant is served with summons ten days before the term of court and no declaration is filed until after the commencement of the next succeeding term it is error to render judgment against the defendant without a rule and service of it on him, to plead; that a defendant in such a case is not in default.

The summens was issued August 29, 1919, and made returnable to the Cotober term of 1919. It was served on the defendant September 1, 1919, which was more than ten days before the Cotober term. We declaration was filed either to the October or November term of 1919.

No declaration was filed until January 15, 1921, more than fifteen months after the Cotober term of 1919, to which the summons was returnable. No appearance or plea was filed on behalf of the defendant at any time. Section 32 of Chapter 110. (Gahill's Statutes, 1921.) prevides, substantially, that if a plaintiff does not file his declaration ten days before the term of the court to which the summons is made returnable, the court shall centimue the sause; and if the declaration shall not be filed ten days before the second term of the court, the defendant shall be shtitled to a judgment as in case of nonsuit,

్రామంఖారు. ఇందా బాగా కుంగా కృష్ణక్షారు. మండ్రామం అంది మండ్రామం అనే మార్క్ కార్ మహి - మీమ్మార్క్ కార్ మార్క్ మ - మీమ్మార్క్ మార్క్ మార్క్

ా. గణా కృతా గవ్ ద్వారాలో ఉద్దేశంల 1.. అక్కాడ ఇక్కాల వేదె. ఈకుక్ కొత్త కాకం కి

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months after the return term, and the defendant having filed neither appearance nor plea, and having made no motion for a mon-whit, was he, the plaintiff, without notice to the defendant, entitled to a judgment? The reasoning in the following cases, incline us to the conclusion that he was not. Eccly v.

Thomas, 70 Ill. 247; Fratt v. Grince, 35 Ill. 164; Fish v. Reces.
46 Ill. App. 428; Unith v. Little, 53 Ill. App. 187; Carnsey v.
Liebwarts, 184 Ill. App. 184; Aubin v. Hayner, 181 Ill. App. 403;
Becomesderfer v. Cerman, 203 Ill. App. 294. According to those cases the court erred in entering the default of the defendant without notice and without a rule to plead. In Fratt v. Grince,
35 Ill. 164, the court maid:

"Undoubtedly, the right is one which may be waived, but we think a party should, at least, have an opportunity to be heard before he is to be consid-

ered as having waived that right.

Eleven days after the declaration was filed, and on the first day of the next term thereafter, a judgment was rendered against the defendant by default, without taking any rule requiring him to plead, and sithout any natice to him. The record shows no waiver of the defendant's right to have the suit dismissed. We think it was an error in disregarding the condition of the record as it then stood, in entering a judgment by default, without a rule, and service of it, requiring the defendant to plead.

Re was not, under the circumstances, in default, and he should have been placed in that situation before a judgment was rendered against him by reason of it. Ordinarily, a party who, without any rule, fails to plead according to the practice of the court, is in default; but a party who is not required to plead cannot justly be said to be in default for not so

doing."

The defendant not having waived his right to a judgment as in case of non-suit, and no notice of any motion or rule
having been given him, it was error to reneer a judgment against
him by default. His motion to vacate the judgment should have

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... ఇదా ... కి. కి. కి. పి. పైక కళికి ఇదేకాలుకోతా ఈశంలో ఇదేశాలలో కూరి ఇది కళికి కళికికులు కూరించిన తరి చేశులో ఇదికోందా ఆమెట్ తిప్కు కళి కళికి కళికి కళికి మంది అన్నికి కొనిపుత్వారికి ఇదికో తిప్కు కళికి కళికి మీరికిందా పటించికోందా. ఏమెట్ కళికి ఇదికో మీరికిందా కళికి కళికి మీరికిందా పటించికోందా. ఏమెట్ కళికి

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been allowed. And, further, no rule upon the defendant to plead may be made, if he insists upon his right to a non-suit.

The judgment is, therefore, reversed and the sause remanded.

REVERSED AND RELEAD D.

THOUsen J. AND O'CORRER, P.J. CORCUR.

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JUEN SILBARY, on al,

Apellees.

V.W.

from Circuit dourt from Circuit dourt Jook Sounty.

Appeal of studies while, while on his section,

Appellant.

225 LA. 65'

MR. JUSTISH WATER DALIVATED THE OFFICE OF THE ASSET.

The complainants, John Silbert, Charles Driakin and A.Henry Goldstein, on December 12,1021,filed a bill of complaint gray.

Ing for the appointment of a receiver for the defendant,

Lipener noter Company, a serperation. On Sevenber 27,1021, the

Chanceller, after a hearing upon the bill and answer, and

evidence which was introduced, appointed one Jasob Goldson as

receiver. This is an interiormetry appeal from that order.

The ploudings, affidavite and evidence introduced above substantially the folicying: -The defendant, Lipmer Loter Company a serperation, with a capital steak of \$40,000,000, sivided into 600 shares at \$10.00 such, on and grior to July 7,1930, was the owner of partile yeal actite situated at MASS North Haleted Street. Chicago, waich was lagraved with a brisk garage worth approximately from the the to the total the only other property eward by the so long consisted of seas scalpsont and effice furniture worth approximately 11,800.00 and two automobiles with shout 1,900.00. The company was organised Outober as 1919, for the purpose of annincturing, solling and dealing in actomobiles, agter vehicles and appearances and to existain and operate a garage for storage and for rejutifing activability. It now not appear that at any time after its organisation and womeny did any business such as it was organized for. Lipenes, who was chief emountive and who was supposed to tuke charge of the automobile business, sold out his stock and left the corporation in the Spring of 1920.

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The witness Bransh, who was corretary after October 4, 1920, and familiar with the affairs of the company in the Summer of that year, testified that at that time it was insolvent; that the company swed interest on a first sortgage to the State Bank of Chicago and also ewed a second mortgage for \$21,00.00, and that there were other creditors pressing for payment. On the real estate of the company, which was practically all the property it owned, there were two mortgages; a first mortgage to secure \$7000.00 and a second mortgage to secure \$200.00. Suit was brought by one Ethel Mehl, wife of Mehl, the president of the corporation, to forceless the second mortgage, on the fround that the first installment of interest which came due on January 7,1921, was unpaid.

In the Summer of 1920 the garage was rented by the company to A. Henry Goldstein at \$500.00 a month. Upon a default in the payment of the rent, the property was then rented to his father, one Harry Goldstein, at a rental of \$150.00 for the per month first month and \$500.00/thereafter. The rent under that lease has been paid regularly and is apparently its only source of revenue.

Branand testified further that at the time the lease to a. Henry Goldstein was made, there was assigned to one Walter Bisbing \$10,500.00 of stock and that at that time Bisbing was not an officer of the corporation.

in the Summer of 1950 for the purpose of putting the garage back on its feet; that he was there about three weeks when he became ill; that they then cancelled his lease and made a new lease; to his father; that at the time of the original lease to him he assigned \$10,500.00 worth of stock in the company to Bisbing, an officer of the corporation, as collateral security for the payment of the rent; that he has offered to pay the \$600.00 which he owes under the first lease if the stock is returned to him. He further testified

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that Mehl undertook to intimidate the stockholders by telling them he was going to foreclose; that mehl told Silbert and Bisbing, ec-complainants, that unless they gave him their stock for twenty cents on the dollar he would cause the place to become vacant and not let it be rented at that time, and that he, through his attorney, would see that they would lose all their rights by a foreclosure of the second mortage which he held; that Wehl transferred the mortgage to his wife and that she began suit through her attorney, Branand, who also represented Mr. Mehl.

On the other hand it is the testimony of Bisbing that A. Henry weldstein assigned the stock in question to him personslly in his own right as a consideration for money furnished by him, Bisbing, to A. Henry Coldstein, and that the stock is new in his possession and is his own absolute property.

In the Summer of 1910 when branand became secretary the corporation was indebted to the Chicago Tribune for over \$400.00 which amount was subsequently settled for \$200.00; to the Daily News for \$200.00, which was subsequently settled for \$120.00. The property had been sold for taxes, which taxes were subsequently paid, and amounted, with penalties, to over \$700.00. The interest on the first mortgage was \$420.00 per year, and which was past due in the summer of 1920, was subsequently peid. The rent from the present tenant is \$2400.00 per year.

In the bill of complaint it was alleged, among other things, "that said Herman F. Wehl and Walter Er mand, Jr., are respectively president and secretary of the corporation and have or should have on hand then belonging to said corporation,

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ారంగా కారా అందిన కారా ఉంది. అది కారా నమ్ చెయ్యులో అంది ముందుడు అయిన నమ్ ముందు మంజుకు అందిన ఇక్కు కారా కూడా మండుకు మొదల చేయలనుమ్ములాను ఇమ్మాన్నాయుడు .మండు మంజుకు మంజుకు కార్క్ కార్డ్ కార్డ్ కార్డ్ మండుకు మండుకు మండుకు మండుకు మండుకు మండుకు మండుకు మండుకు మండుకు 14150.00, and that the alleged default upon eald interest note in merely a protended default and is made for the purpose of discipating the assets of said corporation, and paraliting said Herman F. Hehl, through the instrumentality of his wife, to secure complete control of the assets of said corporation, and that there is in fact no default and social to be default upon any indebtedness of said corporation if said derman F. achl and debert branand, dr. sould credit to said corporation the money in their hands."

It is further alleged in said bill that although Mobert Branand, Jr. is complainant in the foreelegare suit summens was served upon him as secretary of the corporation and "no person is defending said suit."

It is the evidence of Branand who has been secretary of the ocapeny since October 4,1920, that in January or Pebruary, 1921, an interest coupon in the sum of \$75.50 was presented for payment but at that time there were no funds available to pay it and on april 25,1921, a bill was filed to have the mortgage foreclosed.

The pastion crises, do the circumstances as shown by the plaintiff's affidavite and evidence, justify the appointment of a receiver. Of course, such as appointment as ande by the chancellor is tantament to dissolving the corporation by a decree in equity. It is a general fule that a dourt of Chancery may appoint a receiver only where authorized by a statute. There are some exceptions. In Blanchard Bro. and Line v. Gay Co., 289 Ill. 413, the following language was used; "A steekholier may invoke and set in motion the powers of a court of equity to appoint a receiver where the corporation is fraudulently missanaged by the citizers, whereby it is in

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to qualification must see our absent the security off of \$2 Appropriate to present all test prints; testing reside qualitative of \$2000 Appropriate to present the test part of appropriate to \$2000 at testing about the form which bells that the testing of the \$27000 the level of testing a \$2000 and \$2000 at the test of \$27000 All testing the \$2000 and \$2000 at \$2000 at the \$2000 at \$2000 and \$2000 a

inminent danger of incolvency or has been remisred inselvent by reason of such misseanagement". It is provided in the General despotation act of 191s (dahll's Statutes Chap.da, 300. b) as follows: "Courts of equity shall have full power on good sause shown to dissolve or along up the business of any experation, to appoint a receiver therefor who shall have authority """ to sue in all courts and so all things messeary to closing up its offsire as sommanded by the decree of such court."

In the instant case it is shown that the defendant corporation never paramed the parameter of the observer; that its
property consisted enterly of a piece of real estate which
was worth from \$10,000.00 to \$20,000.00; that its only source
of revenue was the rent which it received at the rate of
\$200.00 a month under a lease to one Soldstein; that the
real estate was subject to two mortgages, one of \$7000.00
and one of \$2100.00, which latter was in process of forealogues awing to the failure of the defendant to pay interest
on its infebtedness.

Although the sharge of semeptracy in the bill of samplaint is not entirely in conformity with what the evidence tends to prove, still it is only fair to any that it does sharge mahl, the president of the samplaining stockholders and converted effort to shoul the complaining stockholders and the somporation through the foresistance of the sedend mortrage out of the real estate in question. The evidence of A. Samry Goldetein supports the charge of con spirary.

The chancellor can the witnesses and considered the evidence which they gave as well as the pleadings in the case, and was in a better position to determine the necessity.

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It would seem, under all the circumstances, considering that the corporation has usuced toing business, if in fact it ever began; that practically its only property is real estate upon shick there are too mortgages; that breve is deaper by remote of the southet of the owner of the sequed mortuge through her husband, woll, produced of the defendant company, that the assets of the defendant scapany may be fraululently alspead of to the derives injury and detriment of the complainants, that a rousiver out to be appointed. it would . . on but fair and reasonable as well as a mitable. in such a case on this, where practically the total accord of the corporation are made up of a cincle piece of runl cotate which may be soully and without great expense taken of aree or and makered if persecry for the branilt of the stockholders and oreditors of the objectation, and share there is denger that if the enocts are left ut the entry of the defendant they may be lost to the creations and accommisors, to order a requirer.

If he receiver were appointed it might well be, assuming the allegations of the allegations are not all denied by the evidence that the corporate property would be wanted. If the object of the foreclosure of the accord mortgage, which is presented in the news of the wife of one of the officers at the corporation, (and which out apparently is not being defeaded) is primarily to obtain somplete control of practically all the access of the corporation, that is its real estate, and is the result of a conspiracy with the purpose in view, the completeness are containly settled as a matter of right to the aid of a court of equity.

The decree of the chemodiler is, therefore, affirmed.

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CHICAGO JUNCTION RAILWAY TO., a Corporation.

retiti ner.

V.

BOLLIE F. LEITCH, et al. Respondents.

APPRAL FROM

CIRCUIT OCURT,

COOK COMIX.

HAMIN E. MWSARTHWY.

Lien Petitioner,

Y.

DOLLIE F. LEITCH and OLIVE LEITCH.

Appellants.

225 I.A. 6581

WE. JUSTICE THORNON delivered the opinion of the court.

In this proceeding the Failway Sompany filed a petition to condemn certain property, owned by the respondents, for railroad purposes. The lien petitioner, Mecartney, with one Muey, represented the respondents in that matter. Before the case was reached for trial the Railway Company concluded to dismiss the proceeding and in conference with counsel for the respondents it was agreed that the Company should pay, as attorneys' fees, under provisions of the statute relating to that subject (Ch. 47, Sec. 10, Cahill, p. 1638) the sum of \$10,000.00, and the further sum of \$1.807.06 as and for costs and expenses incurred by the respondents. As set forth in the cyinion of this court on the former appeal of this case, Thicago Junction Ry. Co. v. Leitch, 215 Ith. App. 67, pursuant to the order of the court, the Railway Company paid to the clerk of the court.

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to abide the further order of the court, the sum of \$5.500.00. It appears that the balance of \$6.307.06 was paid by the Railway Company to Wr. Muey, representing the respondents, but it appears he has retained that amount on account of his fees. The lien petitioner filed his petition, claiming as attorney's lien as against the funds in the hands of the clerk of the court. On the former appeal this court held that "The ultimate question of fact to be determined in this case was not how much is Mr. Mecartney entitled to as fees for his services rendered the respondents under his alleged agreement with them, but the question is. For what amount should he be awarded an attorney's lien as against the money paid into the court by the Railway Company?" It was further held that the fact that Mr. Mecartney and Mr. Ruey, representing the respondents in the condemnation proceeding, had agreed with the Railway Company that the amount to be paid by the company to the reco pendents under the statute, as and for their attorneys' fees, should be the sum of \$10,000.00, operated to estop them from claiming more than that securit as their joint and several fees due them from the respondents, for services rendered in that proceeding and, further, that their fees would not necessarily be an equal amount, but should be for such proportionate parts of the \$10,000.00 as it could be shown the services each of them had rendered entitled them to. It appeared from the record that Mr. Mecartney had rendered certain services for the Misses Leitch, which were not directly involved in the condemnation proceeding, but for which he might be entitled to certain fees, as to which, however, he would not be entitled to a lien against the fund paid into court by the Railway Company under the provisions of the statute, inasmuch as such fund had to do selely with services rendered by counsel

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directly in connection with the condemnation proceeding. On the former appeal the judgment of the trial court was reversed and the cause remanded with directions to the trial court to determine the amount of the face to which the lien petitioner was entitled for services rendered in connection with the condemnation case, and to further find the amount for which the lien petitioner might be entitled to a lien as against the funds in the hands of the elerk of the court. We endeavored to make it alear in the former opinion, that for the reasons already stated, Mr. Mecartney and Mr. Mucy tegether should be limited in the amount to be charged the Misses, Leitch for legal services in the condemnation case, to the own of \$10,000.00; that the trial court should determine what part of the \$10,000.00 the lien petitioner was entitled to as feer in that case; that having determined that question, there should be deducted from that amount the total payments the Leitch eisters had made to the lien petitioner on account of his fees and that the petitioner should be given a lien for the balance.

After the cause was remanded, a hearing was had in the Circuit Court on the foregoing questions and the court found that Mr. Mecartney and Mr. Huey were entitled to the \$10,000.00, as and for their fees for services rendered in the condemnation case, in the porportion of seven tenths to Mr. Mecartney and three tenths to Mr. Muey, and that of the \$7,000.00 to which Mr. Mecartney would be entitled, he had been paid \$4,569.06, leaving still due him the sum of \$2,430.94.

In the order from which the former appeal was taken, the court found that the lien petitioner was entitled to a total of \$7,000.00 ap and for his fees for services ren-

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It appears from the record now before us that in the last bearing of this matter in the trial court, it was held that \$200.00 of that amount represented fees for services which were rendered by Mr. Meanthey outside of the condemnation case, and that the total amount to which he was entitled as fees for the services rendered in the condemnation case was \$6.800.00. From that amount there was deducted the payments Hr. Mecartney had received, namely, \$4,569.06, leaving a belance of \$2,230.94, which the court found was still due the lien petitioner from the respondents for fees in the condemnation case, on which amount the court allowed the lien petitioner interest at 5 per cent from April 3, 1918, amounting to \$273.48, which sums the court adjudged and decreed that the clerk pay to the lien petitioner out of the funds in his hands in this case. From that order, the respondents have perfected this appeal.

In support of the appeal the respondents first claim that on the rehearing of this matter after the case had been reversed and remanded to the trial court, the court erred in sustaining the petitioner's objections to their motion that Er. Musy be made a party to the proceedings. In our opinion the court did not err in this regard. The sole issue in this matter is one between the lien petitioner and the respondents, involving the amount for which the lien petitioner is entitled to a lien as against the funds in the hands of the clerk of the court, it being apparent that the respondents would be entitled to the balance of that fund after such lien was satisfied. If Mr. Husy has recured possession of that part of the \$10,000,00 over and showe the amount that was paid to the clerk of the court and if that

and the first of the foreign and the figure and fine parties of the state of the st perform the process with the the body condition in production as all metrics of our largeries was detailed that had were in the man a little for the president of the second regard design to define the another of the confidence in the confidence was non-the activity, or the placement beckering all agreement an the grant performs no rank in the per field service and a respect ថា សភព្វាយ្យ (១១៦) ហើ_{ន្}មែន ក្រៀបសាសន (១១៤៤៨១ ខែ១០ ខ to although the new date, At, ES,SX to special ers. Had the artiful of ev. to thought and though the state of the their had deposite from a add dispension to the great and decembe most on a grater gar district on the area of the same aims tower DEC RESIDENCE AND RESIDENCE OF REPORT AND ASSESSMENT AND ADDRESS. this to be the transfer of the state of the the the section of the with the read of the property and the species and the . Kas in a thi lastasimie

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amount has been retained by him and that amount, together with the amount which the respondents had paid Mr. Musy on account of his fees, is in excess of the amount to which he is entitled as fees, that is a mater which must be settled by the respondents and Mr. Huey. We see no reason why that controversy should incomber the record of this proceeding, which involves solely a question as between Mr. Lecartney and the respondents on the question of his fees.

The respondents make the further point that the Circuit Court erred in denying their motion for a trial by Jury, but the point was not argued and it must therefore be considered as having been waived. Of course, the contention is not tenable.

It is further urged in support of the appeal that the trial court erred in allowing interest to the lien petitioner. The interest allowed by the trial court was from the date of the original order entered on the petition filed by Mr. Mecartney, which was the order appealed from on the former appeal. In the brief filed by the appellee petitioner on this appeal, is referring to this question of the allowance of interest by the trial court, the petitioner maintains that he was entitled to interest under the statute. He claims interest on the \$2,230.94, for which he was given a lien. from the date of the order of the trial court from which this appeal was taken, namely, July 6, 1920. But apparently, the further claim is made that although the petitioner is only entitled to a lien as against the funds in the hands of the clerk of the court to the extent of \$2,230.94, he will ultimately be entitled to recover from the respondents as and for all of his services rendered for them, including those

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For the ressons stated the judgment of the Circuit court, appealed from, is medified by eliminating therefrom all provisions relating to interest, and the said judgment as so modified, awarding the lien petitioner the sum of \$2,230.94 from the funds in the hands of the

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all ables with medical tile but the problem the line in and determine only of exceptions of all probability and design marked beautiful but that the place and placed and has been been been all only only often anything and about the Performance of Spinness of Sections , make and the second section of the second section in the second Core to not to the company of the last way to help the company of from him him and a series of a selection married are some the second in the residence of THE R. LEWIS CO., LANSING, MICH. SHAPE, MICH Mark of the proper would be in said on the will be - handle or or of the same or or including the few ARREST STATE OF THE PARTY OF TH AND RESIDENCE OF THE PARTY OF T of mention of in the strike street of the first and state of the street and suppose THE RESERVE AND ADDRESS OF THE PARTY AND TAKEN THAT internal control of the control of t Parties and the second parties of the second parties and the second parties and the second parties are not provided to the second parties and the second parties are not provided to the second parties are not provi Mind to the contract of the Mark and the Millian and the Marenber ាក្រុង ខ្មែម ស្ត្រា ខាង ២០ ស.ស.២ ស្នា 🐼 🞉 🖫 នេះ 🕫 🕫 🛊 🕸 🕏 a ting the terminate of the second of the second as a same The second contraction of the second contractions and the second contractions are second c Alson a red and about the sale

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In our opinion there is much merit in the contention of counsel for the respondents to the effect that said respondents have been deprived of the use of the funds to which they were entitled, and have been put to much additional expense, due in a large part to a controversy between the two lawyers retained to represent them in the proceedings originally brought by the Railway Company, and, under the circumstances we are of the opinion that the costs incident to the proceedings in the trial court following the former decision in this court, and the costs in this court on this appeal should be borne by the lien petitioner.

JUDGMENT WODIFIED AND AFFIRMED.

O'CONNOR, P.J. AND TAYLOR, J. CONCUR.

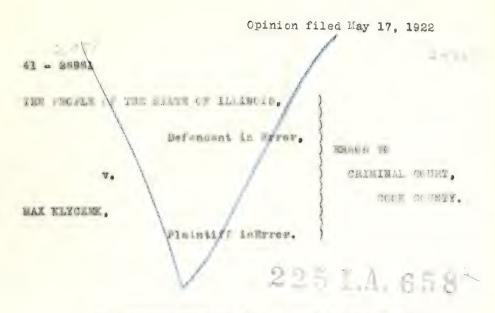
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MR. JUSTICE THORSON delivered the opinion of the court.

By this writ of error, the plaintiff in error.

Klyczek, seeks to reverse the judgment of the Criminal Court of Cock County, by which he was found guilty of contributing to the delinquency of a female child, upon which finding end judgment he was sentenced to serve one year in the State Reformitory at Fontiac and to pay a fine of \$200.00.

tended that at the time of the alleged offense the defendant was under the age of seventeen years and that, therefore, the Criminal Court of Cook County was without jurisdiction and that it was the duty of the trial court to turn the defendant ever to the Juvenile Court. As to this point it is sufficient to say that it was not raised by the defendant in the trial court. It was, therefore, waived and connot be raised now. Jurisdiction of the person is maived by going to trial without objection. Freele v. Lay, 219 111. Ap. 641. Furthermore, by paragraph 25 of article VI of our Caustitution it is provided that the Criminal Court of Cook County shall have jurisdiction in all criminal cases arising in the county.

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By statute, the Juvenile Sourt has been given concurrent jurisdiction in all criminal cases involving children under certain ages, but no statute has been nor could be passed baving the effect of taking away the jurisdiction of the Criminal Court which it has as a result of the constitutional provision referred to.

It is next alleged that before one may be found guilty of the offense charged in this case, the State must prove beyond a reasonable doubt that the female child involved either was or became a delinquent. Of course, this is not the law, the may properly be found guilty of the crime of contributing to the delinquency of a child, under the statute, if he knowingly and willfully does not which directly tend to render the child delinquent.

It is further contend d that a certain confession of the defendant, offered and received in evidence, was improperly received, inasmuch as the evidence showed that it had not been made voluntarily but as the result of certain promises which had been made to the defendant by the police officer who arrested him. On this point there was a sharp conflict in the testimony, the officer in question testified that no such promises were made; that he told the defende ant the best thing he could do was to tell the truth about everything he had done and further, that any statement he made might be used against him. The defendant testified that he was told by the office that if he answered all the questions that were put to him in the affirmative he would be permitted to leave the jail where he was being held and go to his home. Another police officer correborated the officer above referred to, and testified that he was in and out of the room during the

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time of the conversation between that efficer and the defendant, and was present at the time the alleged confession was signed by the defendant, and that there were no premises that he heard, of any sort. In this state of the record, the finding of the trial court to the effect that nothing had occurred to interfere with the admissibility of the confession as evidence, cannot be disturbed. There are dight veriations between the facts relating to the scaurrence in question. as set forth in the confession and as testified to by the complaining witness. These, however, would not go to the competency or the admissibility of the confession as such, but merely to the weight to be given it as evidence. The complaining witness was one alice Barkler, a girl of some 12 years. In the confession, the child attacked was referred to as "F. H. Farkler". This was the name of the child's father. The so-called confession was a written statement signed by the defendant and by the two police officers, referred to, as witnesses. One of the officers testified that he wrote out the statement as the defendant recited the facts. Apparently this mistake in the name was a mistake of the officer, and, in our opinion, does not affect either the validity or the value of the statement as evidence.

It is further contended by the defendant, in support of this writ of error, that the guilt of the defendant was not established by the evidence, beyond all resenable doubt, but, on the contrary, there was sufficient evidence as to an alibi, to warrant this court in reversing the judgment of the triel court. A jury was waived in this case and the hearing was before the court. We have carefully examined all of the textimony as we find it in the record. The complaining witness

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testified that while she was on her way to school, on the morning of February 11. 1920, between eight thirty and mine o'cleck, she experienced the attack complained of. school was about three quarters of a mile from her home and at the time she was attacked she was about half way to school. There were no houses or buildings between her house and the ochocl. She first noticed the man who attacked her, apparently following her from behind, and on the other side of a hedge: i A few moments after she first noticed him, she looked again to see who see making the using she kept bearing on the other side of the hodge, and as she did so, the man grabbed her; that He were an army evercoat and a cap and he had a red handkershief over his mouth and nose. As soon as the man grabbed her, she began to kick and fight and the stack was not accomplished. She testified that she fought for several moments and then did not commber what occurred, but was net able to say whether she lost consciousness. When it was over, her mouth and lips were bleeding and her clothing was bedly term and disarranged and covered with dirt, by reason of her being thrown to the ground. The immediately complained to her mother and the latter summed her musband who make complaint to the police. On the following July 7, the defendent was coarged, by two boys, with having attempted to hold then up. They were in the neighborhood of the place of business of the fether of the complaining witness in this case. He came out into the street and stopped the defendant as he was walking along, and started to question him. Apparently he suspected that this man might be the man who had attacked his little girl. The entire neighborhood seems to have been aroused by the occurrence on July 7, and as the defendant was being questioned by Mr. Parkler, a good many people congregated, and many them the

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complaining witness, Alice Parkler. Her father asked if this was the man she had attacked her. She testified that she told her father, "He was just almost like the man; that he carried the same description in height and complexion. As to this occurrence. Mr. Parkler, testified that his daughter took about five minutes to decide whether this was the men, and during that period, the defendant talked to her and claimed he knew her and that he had gone to the same school she had, but she replied she did not remember that; that he told his daughter not to accuse the defendant unless she was absolutely sure; and she said; "I think that is the man. I am almost sure of it, he talks like him and is dark complexion like he looked, and about his size." Thereupon. Parkler turned the defendent over to the police. The officer who took the defendant into custody testified that when he searched him he found a revolver containing too loaded cortridges, and several empty shalls. He also found two red handkerhliefs, one partly faded and one looking as if it were new; and he said the defendant states that he had bought the revolver from another Solish bey the previous December. and that he and his friend went out every ... unday afternoon and did some shooting; that he asked the defendant if he has done anything else besides carrying the revolver and that later he had said to the defendant; "You are the hoy that held up this Parkler girl", and that he said he was: that the wito ness asked the defendant how he was dressed and he said he had an army cost on which he had procured from a friend of his. and that he put a handkerchief over his face and grabbed hold of the girl and knocked her down; that he was going to attack her but she started to fight and he heard some voices of boys

if Lodes or walk a L . getfore a solle , coence goingle at the limit that the content of the first and appropriate of the second Apa from the ariff leading frequency of the section of Canada Carrier and Analysis and State of the Carrier and As he than percentage, Mr. Bullion, testilling till the new took their the minutes to seek to the to the total total and at total terminated one plates took at hot in your old to be it at tage, and and being that the interest of hereing green gloud the word for all offs builded out was able said the gir greing from eleb me samena på den envelend påd bår 📰 what fire is a state of the additional parties after the aller the annual contracts and the annu gradients a " and of depend and a selfad ad add! සුමුසුද් 2 ක අතු ද දැ. දුරුවුසු වැරි යාම රම්සර නසාරව ස්ට්ට්රණයම් දෙම්ස්ත්රී කිසුඩිරි the party and partially a present a party and a property on the party of with a special med subjections guardenes a special of which they are covered angle shalles. On a self-car the rethe charteness are partly stated out two lags on a teachers. Dirty as the en well hearth for egeting odd blos and have great as a profession and a series of the top of the top of Processia them : kalas see them freight will have et i d. that set to the a telepole reduce on their comitments or to bid ners of the fact of the party of the property of the party of the part life. A sur training eye with presidential and at 1250 and of garast ស្តីស្ត្រ និង ម្នាក់ ខ្លួននេះ ១០ មិនរបស់ សុទ្ធិ អាចរបស់ ស្ត្រីម៉ូន៉េក្តី មានដំបែនកើតដំបន់ សុស and a file as a company agent of the groupe to have fester areas go to the brought a profit biggreens had all delter an inner types to erel selfer on test the gave takenesseen a lat me fact bus Manada at amino mon to term permit and Antonna an image wis ha syst to confer ones became an and and to the being on one but and

and girls who were approaching, and he ran away. The officer further testified as to his writing out the statement later gighed by the defendant and that he wrote down the facts as stated by the defendant. In this written statement, it is set forth that when the defendant as reached the tarbler girl he pointed a gun at her and told her to throw up her hands; that he had a red handkerchief around his face; that he got held of her and knocked her down and lifted up her clothes, and that he wanted to rape her: and that he then heard voices and got seared and got up and ran away: that on that morning he wore an army overcost that one John Elyszek seve him: that after it wesever he ran through the field and went home. The complaining without tentified that upon the occasion in question she saw no revolver. Deference has already been made to the substance of the defendant's testimony will regard to the making of the confession. He further testified that when he was arrested, the gun he had in his pocket was one he had procured because of his desire to have something in the way of a celebration on the previous Fourth of July and that at the time of his arrest he had no loaded certridges. He denied that he had ever talked to Mr. Parkler, the father of the complaining witness, in one part of his testisony, and in another part of his testimony he says that he told Mr. Parkler that the statements he had made in the alleged confession were true. The defendent further desired, categorically, the alleged occurrence here complained of.

fied that on Pebruary 11, he was employed by the Hero Furnace Co., which was located some distance away from the point at which the complaining witness was attacked, and that on that day he was at work at the furnace company shops from seven

to the term of the end the magnification of the settle of I is also disast the group programme call for the field \$7.00 group. At the local cris with a well the Presental and girleys mara paudicale a profile outs pi ស់ការព្រះ មិន២ សំរុំ សូវ ភាជន ។ are the last the a free as a contact the day of the palitant that you wrote hat that John has that I've was at Bertalay be has let best prest and investigation between the best best best _เพระเสรุธิจ ราย คน ผู้เครียว 1967 กระบอ ชาย โดยว่าหนาก โนท ตรง ใน major haved noth to had the great ages of former of half the ामहास्त्रकार अन्तर्वे कार केंग्स क्षा क्षा कार्य ្រុស្តី ១៩១ ឆ្នាំស្ត្រឡាប្រែក្រុង ស្ត្រី និយាន និយានិយាក់មាន ស្ត្រីស ១៤ នាមីអង្គ 📁 ARREST AND DESCRIPTION OF THE PARTY AND THE PARTY NAMED IN at authors of her but the telephone was a patelologue will mental me see at retained. Jetyrone has single our <u>សុសា ស្រី ដែលសុខ ប៉ុន្តែម ប្រជាព្រះជំនិងមាន សេសាស្រាល់ មានស្រាល់ សេសាស្រាល់ មានសេសាសាសាសាសា</u> of the conference or metare backet the come as and the control of the control of the control of the control of entition of the grant of the grant with the contract of the er riving a least of the companion of th but ever belief in its incline, the british of his sectionists The control of the grown factor of the difference of the grown of the tic spit trains. In 111, a lance of energial earlies at paid the galaction beautiful place of a second as estant to position and got a listogram of the colling the first tenths will . 10 . 1: 15 1- CHO - - - 1 CADES

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e clock in the morning until four thirty in the afternoon. One H. E. Clutterham, the superintendent of the furnace company; testified that the defendant started to work with them about the middle of January and continued until sometime in July: that on February 11, 1920, the defendant worked nine hours, beginning at seven in the morning and quitting at four thirty in the afternoon. The witness produced certain records for the week ending February 12. These records showed that the defendant was off one day during that week, which the witness said was the first day of the week .- "It was probably about the sixth." In cross-examination he stated that he could not say whether he was present at the factory all during the day on the eleventh and that he could not state from his own personal knowledge that the defendent worked at the factory nine hours on that day; that all he know was that the records produced credited the defendant with nine hours on that date, and that none of it was over time. One Bremlin, s sheet metal worker, employed by the formace company, was asked whether the defendant worked there on February 11, and he said he could not remember; that he had only seen the sefendant off once, which was on the occasion of his getting hurt in some way: this he said was durin, the summer. The witness then said he was sure the defendant was working there every day throughthe month of February. Nobert Clutterham testified that he was employed by the furnace company from about February 6, on; that he know the defendant, who worked in the same room with him and that as far as he could resember, he was working there. during the days in February, when the witness was there. The records produced by the witness H. E. Clutterham, showed that there were three days in the week of April 9, when the defendant was not working, which would seem to weaken the testimony of

Connect the contract the first term of the specific and the first where we are the contract the contract of the THE PARTY OF THE P The second second of the computation will be a gradual for the second of the computation with filter as for a key settle all completes a deep pair. to printed an amount of the parentles around Little traction we wise of the property of a state of T Tarrie dan da see in a seen a da carrero il. Come interestination Light office and action of the contract and the តាចក្រុស ខេត្ត តាស្ត្រ ខេត្ត បាន «១៤ និងស្ថា ១៩៦ ១០ ខេត្ត និង នេះ និង ១០ ខេត្ត និង និង និង និង និង និង និង និង And/ beliefo to substitute the wrong of the fact and dende wided The parent will be investigate ad author are the binar of el la com al como a tall hor altractio all per jub pel pellesb in tomorrows or a second of the second of th and the proof of his two in arms or notice only regions to An it spin with this long to iteration passions than the graffice the court today to all a sugar detectors and deals we - I COMMON OF SHALL RECORD AND ADDRESS OF THE PARTY AND ADDRESS OF THE which we said your give but we also prove store for bushe of class out as lawn west as all to motorces or any constraint passes the Same ្មាស់ ខេត្ត នៃ «ស្រាស់ ស្រុក Can continue to Seriation the Windsall and agree one are great a had belief of the party of th I to all governor for the control to the property of the prope ាស់ដី ស្រាក់ទី ស្នាក់ () នាក់នី ដែកទាន់ទី សក្សា ខ្លួនកសក់ ១០០១ () នី ទាន់ដក់ សូមី នី សំនឹង ation is not the same on a ground of the life and are the same and a set in a and the entry of the east of the example of the for a limite, enterprised to the contemporary therefore at the local contract of the army at any and area that are in profited by codern to with every a late gains and an

some of his co-workers to the effect that he was not absent from his work at any time. These records also contradict the testimony of the witness Bremlin, who said he was sure the defendant was at his work every day in the month of Pebruary .- the records showing that there was at least one day during the week of February 12, when he was not working. When it was cought to introduce these records, objection was made, unless it was shown that the sitness made then himself. was then asked about this and he stated that he had not made then himself. It later developed in his testimony that one Pepper was the foreman of the plant at the time in question and that he made a record of the time of the employees on slips which he turned into the office, and apparently N. S. Clutterham, the superintendent, made up the record introduced in evidence, from these slips. The slips were not produced and the foreman did not testify, although he had been subposused as a witness. He was in court the day before he was called upon to testify but did not return the fellowing day and efforts to reach him failed.

In this state of the record we are not in a position to say that the defendant was not proven guilty beyond a reasonable doubt. There is a sharp conflict in the evidence.

The trial court saw the witnesses and heard them testify and was in a much better position to judge of their credibility then we are. The evidence relating to the slibi is not very convincing,—its accuracy is not properly established and although objection was not insisted upon as to its admissibility, the weakness referred to affects its value materially.

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that upon praying an appeal to this court, it was allowed upon the condition that the defendant filed his bond in the sum of \$5,000.00, and that later, without the knowledge of the defendant, the court vacated and set aside the order fixing bail, and it is contended that in this the trial court erred, it being the duty of the court to stay the mittimus on condition the defendant furnished a good bond. This point is not tenable. The proceedings involving an appeal from the trial court were irregular, including that involving an appeal bond. The record does not show that the defendant made any action requesting the court to stay the mittimus, pending the suing out of a writ of error and the application for a writ of supersedean.

We find no error in the record and therefore the judgment of the Criminal Court is affirmed.

AFFIREND.

o connor. P.J. AND TAYLOR, J. CONCUR.

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STREET, ASSESSED BY AN ADDRESS.

Opinion filed May 17, 1922.

58 - 27006

S. E. RUNNKE.

Defendant in Trror

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

GRORGE E. POTTINGER, EDWARD BALLARD & RAY B. WHITHAN,

Plaintiffs in Brror.

225 I.A. 658°

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff Rubnke, brought this action in contract in the Tunicipal Court of Chicago against Pottinger and Ballard, as co-partners doing business as Ballard, Pottinger & Co., to recover an amount alleged to be due him from the defendants on two promissory notes and on an account stated. The defendant, Edward Ballard appeared and denied the co-partnership alleged and also that there was any indebtedness due the plaintiff. A trial was had before the court without a jury, resulting in a finding for the plaintiff, whose damages were assessed at the sum of \$801.14. To reverse the judgment of the trial court for that amount, the defendant Ballard sued out this writ of error.

It appears from the record that one Frank E. Ballard and the defendant Pottinger were in business as a co-partner-ship under the name of Ballard, Pottinger & Co. On April 5, 1916, Frank E. Ballard died. It also appears that the defendant Edward Ballard and one Whitman, were copartners doing business under the name of Ballard, Whitman & Co.

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After the death of Frank E. Ballard, the firm of Ballard, Whitman & Co., acquired the interest of Frank E. Ballard or of his widow, in and to the assets of the partnership of Ballard, Pottinger & Co. (which fact does not appear in the record, except as it is recited in the contract hereinafter referred to) and, thereafter, on September 27, 1916, they entered into an agreement with Pottinger, appointing them his agents, and giving them authority to carry on the business of Ballard, Pettinger & Co. for the purpose of winding it up. Under this agreement, this agency was to continue until January 1, 1917. Under date of December 30, 1916, the agency agreement was extended to and including July 1, 1917.

The plaintiff's claim consisted of three items one a promissory note for \$450.00, dated October 1, 1917, and another a promissory note for \$175.00, dated ovember 5, 1917, each of which notes was signed "Bellard, Sottinger & Co." and each one being a renewal note executed to take the place of a prior one of like amount. The other item, going to make up the plaintiff's claim, consisted of an account stated, in the sum of \$156.90, with interest. It was admitted that one of the notes involved was signed by the defendant Edward Bellard and the other was signed by Whitman.

Only one point is urged by the plaintiff-in-error in support of his contention that the judgment of the trial court should be reversed and this point involves the question of fact as to whether the defendant Edward Ballard, who apparently was the son of Frank E. Ballard, above referred to, was a member of the firm of Ballard, Pottinger & Co., or, if not, whether he held himself out as a partner so as to now be precluded from asserting the contrary. The only issue of fact

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involved in the evidence has to do with the latter question, mamely, the question of whether the defendant ballard held himself out as a partner in the firm of Ballard, Pottinger & Co. On that point there is a direct conflict in the evidence. The plaintiff testified that the defendant Ballard told him that he was a member of the firm of Ballard, Pottinger & Co., consisting of himself, Whitman and Pottinger. This was in a conversation occurring early in the year 1918. We also testified that in a conversation with the defendant Ballard, in the presence of Whitman, in June or early in July, 1917, he requested a payment on his account due from Ballard, Pottinger & Co. "for work ordered by Wr. Ballard and different members of the firm at different times"; that the balance then due was \$156.00: that Ballard stated they were pretty hard pressed for funds and were not in shape to pay much; that they could not give him a check as it had to be countersigned by Mr. Pottinger and he was not in. One Willis testified that in a conversation he had with the defendant Ballard on November 1, 1916, the latter told him that the firm of Ballard, Pottinger & Co. consisted of Pottinger, Whitman, and himself.

The defendent Ballard denied that he had ever made the representations to the plaintiff above referred to, about which the latter testified. He admitted that he had had a conversation with Willis but stated that he did not tell him that he was a member of the firm of Ballard, Pottinger & Co., but that he stated to Willis that because of the death of Frank R. Ballard, the partnership had ceased; that the surviving partner had the legal right to wind up the partnership business and that "we arranged with Kr. Pottinger to handle it for him as agents", referring apparently to Ballard, Whitman & Co. As to the

and the second when highly on an inarparation to rolline the proout as a partie is a discount to a contract a second the contract of the second second of the second sec brailer to protes and send and tions limited will regrister, profitallits and the godine a gas ed inch mid the on of the call of the call of the call to general one and the second of and all affect wants and the filter police and the contract and of , buside the conversable and the converse and desired Deserge of Voltago, in these of warty is 1 by, 1417, 14 wrighth of the flow dark out farence and we awarded a beforeup are the contract of the contract of the contract of the contract of the late and committee for that glasser presents as sold we be ACRES AND ADDRESS OF SALES AND ADDRESS OF THE PARTY OF TH filled to all a for \$1000. Engled exists and from ever less alone to -itm . Ti , hempisserties as as est it as varies sets evin . -To the man man of the filling and the transfer of the out to it was a month of the design the control of of a megalities, four limit to make the four rest rest rest rest DOUGH OF SHIPLING PLANSAGE OF SEPARATE

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latter conversation, Willis testified in rebutial, that he wastalking with the defendent about the death of Frank R.

Ballard and he asked the defendent of whom the firm consisted and that the defendent told him that Whitman had purchased the interest of the widew of Frank E. Ballard in the partnership and that he (the defendent Ballard) and Whitman had an equal share in one-half of the partnership and that Fottinger had the other one-half interest. Willis further testified on cross-examination, that he understood they were going to wind up the business of the firm and pay their debts. "That is what Edward Ballard told me and he told me that he and Whitman were partners."

The defendant Ballard being recalled, testified that he told Willis that he and whitmen had purchased the interest of Frank E. Ballard in the firm of Ballard Pottinger & Co. and he further testified that the fact was that some time prior to that time, they had acquired such interest from a sale in the Probate court. The defendant introduced in evidence the contract between Pottinger, Whitman and himself, dated September 27, 1918. This contract was between Pottinger, as party of the first part, and Ballard and Whitman as parties of the second part, as copartners under the name of Ballard, Thitman & De. This contract recited the death of Frank E. Ballard and the consequent dissolution of Rallard, Pettinger & Co. It recited that the second parties had acquired the interest of Frank R. Ballard in the assets of that firm; that the partnership did not have sufficient meneys to meet certain open accounts and it was the desire to collect sufficient accounts due the partnership, and to sell such of its assets as might be necessary to meet all partnership debts, represented by such open accounts, and make a ្លា ជាប្រាប់ និង សម្រែក ប្រសិត គេកាស់ ជាក្នុងបានប្រជាជា សម្រេក និង ប្រជាជាធា ប្រជាជាធិ ប្រជាធិ ប្រជាជាធិ ប្រជាធិ ប្រជាជាធិ ប្រជាជិ ប្រជា

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division of the remaining assets of the partnership. It further recibed that the parties of the second part were willing to devote their time up to January 1, 1917 to that end: and that the party of the first part was willing that they undertake the collection of the accounts owing to him as the survivaing partner of Ballard, Pottinger & Co., and the selling of such of its assets as might be necessary for the aforesaid purposes. It was then set forth that the party of the first part, appointed the parties of the second part his agents, with authority to collect all accounts then due or that might afterward become due to the party of the first part, as the surviving member of the firm of Ballard. Pottinger & Co., and sell so many of the assets of the firm as might be necessary to pay the open accounts then due by the party of the first part as such surviving partner, said agency to continue to January 1, 1917. It was agreed further that all moneys collected pursuant to this agency were to be deposited in the name of Ballard, Pottinger & Co., and that after expenses were paid, the accounts of the creditors of the firm were to be duly paid. It was further agreed that the parties of the second part were to have possession, control and direction of the offices and affairs of Ballard. Pottinger & Co. subject to the right of the first party to keep his desk in the effice and that all business transacted by the parties of the second part was to be in the name of Ballard, Pottinger & Co. It was also agreed that each of the parties of the second part was to draw out of the funds of Ballard, Pottinger & Co., \$25.60 per week, which was "not to be considered or treated as salary paid or received by the second party, but to be treated and considered as so much paid and received by them on account of their interest in the firm of Ballard, Pottinger & Co. 6

and the contract of the second grants of the second making which read there out to making all the petition and er frem a un er sant far for de la er er er er er er er er wyspapian in a secretary and the new strain and the discussion of <mark>⊶ម្មា</mark>ម្រោះ មាន គ្រាន់ក្រុង ស្រុងក្រុង ស្រុងក្រុង ស្រុងក្រុង ស្រុងក្រុង ស្រុងក្រុង ស្រុងក្រុង ស្រុងក្រុង ស្រុងក្រុង than to wellfur off the arm i morninger, Anglief to tention of of the spream as within he propriesely in the effortants becomes, If you live not ladde only no order of one first years sported of burden to be along the box borner on he making up he not proven by Jeglie Jail by got sail alternate Lie Dellow of he has been accorded by the party of the organization beater at title on the time at least time to be and the property of the អាកា ស្ថានគ្នា នេះស ត្រាក នេះខែ ស្ថេនកន្លានគេ គ្រាប់ ជាមាននិះខេត្ត នេះ យោងនិះ ការដី ម៉ឺក និងម ការប -yiving about to design in the the given and the ment where the TA ATTIC AT TAXABLE AT HOSPIGHT OF TRANSPARTATION AND miles of America brigadine whom his ton control freeign and regration deposits to the electron of "illars, Newtone and to algorithm to take and and and and the walled of the Clin wave to be debt. This is a "outless -territoria in the company will be positive and feel footpas " o tipl' a tree seating of the cities and and the cities and the Lineard, facilities a decision of the regulation about the president alle test i er enditte ein da feela hid eest et ាស់ ស្នា នៅ ១០ ១១០ ខេឌ្ឌ ស្រាមមាន ១១០ និង សង្សាន់ស្នេ ១០០ មួនី ស្វាម was allered, so the low in the control of the Abelian to some but to a few and permanent our fine appears of the extrang out to And the printing of the latter and the printing printing and the wis al reviews. In since yearns we bedoend no berebictus si of ancord porty, but to be trusted and sevenier to be made poten settle odd, old to company best for detrinous my political constant best A part of second of all the contract of a

On this record we are not in a position to say that the finding of the trial court was against the manifest weight of the evidence. While the defendant denies that he held himself out as a member of the firm of Ballard, Pottinger & Co., there is direct evidence to the contrary, submitted in behalf of the plaintiff. Even the contract introduced by the defendant, in an effort to establish an agency and disprove a partnership, contains clements which tend, in some respects, to support the plaintiff's theory of a partnership liability on the part of the defendant. It recites the dissolution of the old partnership by reason of the death of Frank B. Ballard; the purchase by the defendant Ballard and Whitman, of the interest of the doeased partner in that partnership, and then, after making provisions for a continuation of the business on the theory of an agency, it provides for such continuance under the partnership name of Ballard, Pottinger & Co., and for a withdrawal of a given amount each seek, by the defendant Wallard and by Whitman, not as a salary but "on account of their interest in the firm of Ballard. Pottinger & Co. This contract covered other interests in a company known as the haywood Company which are not involved here. In our opinion the evidence is sufficient to support a judgment for the plaintiff on the theory that at the time the renewal notes which were sued upon were executed in the name of the partnership, one by the defende ant Ballard and the other by Whitman, and at the time the open account sued upon became a stated account, the defendant had either expressly or impliedly, or in both ways, represented that the then existing partnership, known as Ballard, Fottinger & Co., consisted of Pottinger, Whitman and himself, The defendant points out that the amount owing the plaintiff, with the exception of a small part, was owing to him by the partnership of Ballard,

ella pinto ago il saglidisci in ella age escribe. Describe altre 20 on the state of the company of the state of and Transa bine of the said Control Control and State . sans in all which and it manufact that he will all to below 4 by -cluft on the Michael of helding the states of it were the Will live the contract beingsment to the infinite in an affect of wall address a commercial a regarding that appear or fill in the I suit, it has been been as we will be the second and a grand a suit of a. modimelia లేక క్య కా. ఈ గానక యు ఇద్దుకు ప్రక్షి ఇద్దించారున్నాను. మీది క and to assets with meaning of the will the medical contract to Beatles desired as the professor the Land Park of the Called - Ditrac, of the .a. tree as recent because the that werehe materialized a reference against not be a made in a glarger easo for, not setánour la present de la Vineral est un (of a manufactual parties to e un giderostan all serios see winds to develop the second of the best of to success me the gast of the start of the tradition warn mist. ".v. o magasisins ak mailan Ta mail sak mi anemint the still and an owner quipme a si alongstal salis bearing that employ a cob are but involved norm, the ear energic un estament a millione to massia a polytone for the picturill on the me B contract the fact the contract of the section of the fact that water in the the the court of the actions in a term of the transfer, ment off and one in our providing of making the Brailet of seedes rund apea feeren a stured sacerett, is a siterat bar stilled wastered to be be and all as a processed that the first applied marketonic being as filled, out here I have our clark the market the pick pick. The first all all the car to be soull part, who eving to him by the serveribility of healted,

Pottinger & Co., prior to the undertaking of Whitman and himself to manage the affairs of that company, under their agreement with Pottinger and prior to the time plaintiff claimed the defendant Ballard held himself out as a member of the partnership. This is true, but in our opinion, it is not material. The two renewal notes sued upon were given after that time are the item based on open account became an account stated, after that time. It is contended that there is not sufficient proof of the account stated. With that contention we do not agree. There is evidence by the plaintiff which is not contradicted, that in June or July, 1917, he asked the defendant Ballard, in the presence of Whitman, for payment on the account due him from Ballard, Fettinger & Co. "for work ordered by Mr. Ballard one different members of the firm at different times" and that the defend at stated that they were hard pressed and were not in shape to pay much: that Ballard then promised a payment of \$25.00 which was subsequently made: that on the occasion referred to, the defendant said they could not give him a check as it had to be countersigned by Pottinger.

For the reasons stated, the judgment of the Municipal Court is affirmed.

AFFIRMED.

O&CONHOR, P.J. CONCURS; TAYLOR, J. DISSENTS.

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38 - 26977

FRANK STOMPOR

Defendant in Brror

VO.

JAMES F. RERABUK, Administrator of the estate of KARY STORPOR, deceased.

Plaintiff in Brror.

SUPERIOR COURT.

GOOK COUNTY.

225 I.A. C

MR. FARUIDING JUSTICE GRIDLEY DELIVERSE THE OFINION OF THE COURT.

On June 17, 1919, during the lifetime of Mary Stompor. a judgment by confession on a promissory note was entered against her in the Superior Court of Cook County for \$1927.50, in favor of plaintiff. The note is for the principal sum of 11700, dated March 14, 1918, payable on demand to plaintiff's order, with interest at 6% per annum after date, and provides for 1100 attorney's fees. On the day of its date it was signed by . . Stompor, the husband of Mary and a brother of plaintiff, and delivered to plaintiff. On June 15, 1919, . . . tompor, died. On June 16. 1910, at the request of plaintiff, Mary Stompor placed her signature in lead pencil upon the note immediately under that of tompor, while she was on her death bed in a tuberculosis hospital in Chicago and not advised of the death on the preceding day of ". Stompor. The died intentate on June 23. 1919. (six days after the judgment by confession against her had been entered) leaving her surviving four minor children as her only heirs at law and ment of kin. Whortly thereafter James F. Herabek was appointed by the Probate Court of Cook County administrator of her estate, and he was also appointed guardian of said minor children. Unbsequently on Herabek's swern petition the judgment confessed was vacated by the Superior Sourt and he was given leave to plead. He filed as administrator of the estate of Mary Stompor, deceased, several varified pleas, among them (1)

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CAUSE IN 1818, market for historian of they changed failing leader are that contained a st talestine of fraudite A need at all their tell trace which have released wit all the policy and the last positioning our set of area and artificially be Bldg rebys of 7721-44-12 of bloods we appropriate by about Ditte not rativers by captabarate bound see Ad to r and the second control of the formation of the control of the cont kar , ildeniste de endones : ben go le de bendeel est "go . . . we will propose to the last of the sale of Pass II. 171 , in the remark of claim the contract of the rate of their plantal blank of he add note lines, have at sparsers and all Aller States and the Land States and the Aller And the Aller States and the military of the State of the Landyla can be equilible at Datasses mint gives at south or other mater hard and a temporary of the gate want but you designed out or the first and walled state of the cor of ground value that all the parties of animal (headed • वर्षारी पानने विकास सार्वित पार्टी पानिष्य । • हाहाने दिन प्रमाश किल हा । है है हा हर । है រូវនា (. ១០៩៦ ដី៦ ១១ភព៦ ១៩១៩០១៥ ១៩១ ឬ៩ ខែទុខ៩៩១ជួន ១១១ ១១១ materials; herefore believed in the partial and the contributions medifical account of particular and all properties of the contract of the cont the federate conference was required by the mounts of the federates. . I fan lang to sleet . I'd Vilet e wistele breten of the an is e filosophi turren er a filotoria filotoria. Carriga da esemble esemble e

general issue. (2) that Nary Stempor "did not make and deliver the writing" as mentioned in the declaration, and (3) that she signed her name to said note on June 16, 1919, "without any consideration to her paid." After the cause was put at issue, and after Rerabek, as administrator, etc., had been substituted as defendant, there was a trial before the court without a jury. Plaintiff and one witness in his behalf testified, and Rerabek and two witnesses in his behalf testified. The court found the issues for plaintiff and assessed his damages at 11700, the face of said note, and on North 7, 1921, entered judgment for said assessed herabek, as administrator, etc., to be paid in due course of administration, which judgment it is sought by this writ of error to reverse.

No useful purpose will be served in a discussion in detail of the avidence. Suffice is to say that while it appears that Wary Stempor on June 16, 1919, placed her signature on the note at plaintiff's request in the hospital, it also clearly appears that she was in a very weak condition both physically and mentally, and that she did not receive any consideration at the time or at any time from plaintiff or enyone clos for her said act. We are of the epinion that the judgment against Herabek, as administrator of her estate, cannot stand, and accordingly it is reversed.

REVERSED WITH FINDING OF FACTS.

Barnes and Morrill, JJ., concur.

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36 - 26977

FINDING OF FACTS.

We find as facts in this case that the deceased.

Wary stompor, at the time she placed her signature on the

note in question did not receive any consideration therefor

from plaintiff or any one else, and that said note, as

against her or the administrator of her estate, is without
any consideration.

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AUGUST S. WERRHEIM.

Appellant,

VS.

MORRIS JOSEPH, BARUEL JOSEPH and JOSEPH BROS. LUNBER CO., a corporation.

Appellees.

APPEAL FROM

MUNICIPAL COUNT

GF CHICAGO.

225 I.A. 6591

IN. SU'SINING JUSTICE GUIDL Y DELIVERS THE CRIMICS OF THE COURT.

On March 1, 1921, plaintiff (appellant) filed in the Municipal Court of Chicago a complaint in forcible detainer against defendants (appelless) charging them with unlawfully withholding from plaintiff the possession of certain premises in the City of Chicago. A trial was had before a jury resulting in a verdict finding the defendants not guilty. Subsequently the court entered judgment against plaintiff for costs and this appeal followed.

It appears that on February 26, 1916, plaintiff, by written lease, domised the premises to the defendants, Dorris and Lamuel Joseph. (designated on parties of the second part) for a term of five years from Earch 1, 1916 to February 28, 1921, at a monthly rental of \$180, payable in advance; that subsequently the lease was duly assigned, by said leasees to the defendant, Joseph Tros. Lumber Co., of which corporation said leasees are officers and stockholders; and that the defendants were on Narch 1, 1921, and at the time of the trial, in possession of the premises. The lease contained the following provision:

"And in consideration of the undertakingsherein contained to be kept and performed by the parties of the second part, the party of the first part hereby agrees that at the expiration of the term created by this indenture the parties of the eccond part shall have the option of renewing this lease for an additional period of five (5) years upon the same terms, conditions and sevenants as are contained herein, escapt that

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ក់ថ្ងៃ គួន (នាដូច) (ប្រហែល (បានសេ) ប៉ាន់ស្រែប (ប្រហែល ប្រែក្រឹ ប្រើបានសេច (បានប្រែក្រឹ ប្រែក្រឹក្សា ប្រែក្រឹក (បានប្រើប្រាក់ ប្រែក្រឹក (បានប្រើប្រាក់ ប្រែក្រឹក (បានប្រើប្រាក់ ប្រែក្រឹក (បានប្រើប្រាក់ ប្រឹក្សា (បានប្រើប្រាក់ ប្រឹក្សា (បានប្រើប្រាក់ បានប្រឹក្សា (បានប្រើប្រឹក្សា (បានប្រឹក្សា (បានប្រិក្សា (បានប្រឹក្សា (បានប្រឹក្សា (បានប្រឹក្សា (បានប្រឹក្សា (បានប្ការ) (បានប្រឹក្សា (បានប្រឹក្សា (បានប្រឹក្សា (បានប្រឹក្សា (បានប្រិក្សា (បានប្រឹក្សា (ប

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the reserved rental shall be the sum of two hundred dollars (\$200) per month instead of one hundred and eighty dollars (\$180) per month, such option to be exercised by the parties of the second part by giving in the party of the first part written notice of their intention so to do at least six (6) months prior to the expiration of the term created by this demise."

Counsel for appellant in his printed brief here filed says: "The case turns upon the question as to whether the appellees (defendants), on or prior to august 31, 1920, gave the appellant (plaintiff) a written notice of their intention to renew. If they did, the judgment appealed from is correct. If they did not, the appellant was entitled to the possession of the property on Morch 1, 1921, and the judgment is erroneous."

It appears from defendants' evidence that on August 23, 1920, the house atterney of defendants, at their request, dictated a written netice to a stenographer, who transcribed it and handed it as transcribed, together with an envelope addressed to plaintiff at 118 N. LaDalle Street, Chicago, (where plaintiff then had his office) to said atterney; that said atterney then caused said notice to be signed by the secretary of the defendant corporation, and afterwards enclosed the notice so signed in the envelope, so addressed, and scaled and stamped the envelope and deposited it in a United States mail box; and that the letter containing said notice was never returned to the defendants although the envelope bore in the upper left hand corner the correct address of the defendant corporation. A copy of the notice referred to is as follows:

*August 23, 1920.

Er. August S. Wehrheim, 118 W. La Salle St., Chicago, Ill.

Dear Sir:

This is to notify you that the undersigned assignee of lessess under a certain lesse entered into with you on February 26, 1916, covering premises located at 1727-1759 Wellington ave., Chicago, does hereby exercise its option of renewing said lesse for an additional period of five years upon the same terms, conditions and covenants as are therein contained, except as to the reservation of the payment of rental of two hundred dollars (\$200) per month.

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Yours very truly. JOSEPH BROS. HEMBER CO.

Assignee of Samuel Joseph and Morris Joseph."

to Deptember 1, 1930, or subsequent thereto, receive such notice, or any written notice similar thereto. There was also testimony regarding certain conversations had between plaintiff and the Josephs during the menth of September, 1930.

Counsel for plaintiff first contends that, as to the issue whether plaintiff received the written notice on or before August 31, 1930, the verdict is against the manifest weight of the evidence. It is well settled that proof of the mailing of a notice properly addressed is prime facia evidence of its having been received by the party addressed, and that this presumption of fact may be related. (Raj. v. American Bottle Co., 182 Ill. App. 636, 641; Neyer v. Krohn. 114 Ill. 574, 886; Young v. Clapp, 147 Ill. There proof of the mailing of a properly addressed notice to the party is made and said party denies that he received it, the question as to whether he received it is for the jury to determine under all the facts and circumstances in syldence (22 Corpus Juria, p. 102, sec. 44; Haj v. American Bottle Co., supra. p. 642; Never v. Krohn, supra.) After a careful examination of the evidence in the present case we are unable to agree with councel's contention.

of law the provision in the lease, above quoted, required that the notice be served personally on the leaser (plaintiff) which admittedly were not done. This it is the law of this state that where a statute requires the giving of notice and there is nothing in the sometat of the law or in the circumstances of the case to show that any other notice was intended, personal notice suct be

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given. (Haj v. american Bottle Co., 161 III. 162, 365), and there are cases helding that where notice is required to declare a forfeiture under a policy or certificate of insurance, forfeitures not being favored by the courte, the notice must be personally served, we do not think that this strict rule should be applied to a provision in a written contract requiring a "written notice" to be given of intention to exercise an option, so in the present case. (Consolidated Coal Co. v. Block & Martman melting Co., 53 III. App. 565, 572; Raj v. mariann Bottle Co., supra.) In our opinion counsel's contention is without merit.

The judgment of the Municipal Court is affirmed.

Barnen and Morrill, JJ., concur.

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ANDREAS AND THE PARTY AND ADDRESS.

97 - 27047

GENERAL MOTORD ACCUPTABLE CORPORATION.

Appellant.

VS.

APPRAL FROM HUNICIPAL COURT OF CHICAGO.

RHODES GARAGE COMPANY.

Appollee.

225 I.A. 654

MR. PRINCIPAL JUNTER OF THE COURT.

In replevin in the Municipal Court of Chicago to recover the possession of a certain automobile described as "one 1930 Oldsmobile, Model 45, serial number 4480." In the affidevit it is alleged that plaintiff is lawfully entitled to the possession of the automobile, and that on Way 6, 1921, the Rhodes Garage Company, defendant, wrongfully took and wrongfully detains the same. The bailiff took it under the writ and delivered it to plaintiff. After a trial without a jury the court found that the right to the possession of the automobile was not in the plaintiff, and, on June 21, 1921, entered judgment in favor of defendant and directed that a writ of retorno habendo issue. This appeal followed.

The facts as disclosed from the evidence are in substance as follows: On April 6, 1920, one 0. Trump of Sterling, Illinois, and there doing business under the name of the Superior Notor Car Co., sold and delivered to one Leonard Jones of the same place the automobile in question. As a part of the purchase price Jones gave Trump his promiseory note for \$1360, dated spril 6, 1920, payable in installments of \$126 per month for 10 months. The payee was the Superior Notor Car Co., the name under which Trump conducted his business. To becare the note Jones on the same day executed a shattal mortgage on the automobile and the mortgage was subsequently recorded. Trump, in the name of the Superior Notor

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Car Co., endersed the note and assigned the mortgage to plaintiff. Jones made the monthly payments due on the note up to and including December, 1920. He did not pay the Oth and 10th installments due on January 6 and Vebruary 6, 1921, respectively. On January 26. 1931. Jones surrendered the automobile to Trumb, the original mortgagee, and received in exchange a certain automobile truck, and Trump agreed to pay to plaintiff the two unpaid installments on the note, und, as Jones (plaintiff's witness) testified, "clean it up." Furmant to this agree out Trump come to Chicago prior to February 6, 1931, called on plaintiff and informed Coborne, its credit man, of his transaction with Jones and that he (Trump) had received back from Jones the automobile and would pay plaintiff the two remaining installments due on the note. Orborne, plaintiff's witness, testified that the arrangement as outlined by Trump was "astisfactory" to plaintiff. On or about wareh 26, 1931, Trump drave the automobile to Chicago and there sold and delivered it, together with two other automobiles, to the American Auto Wales Co. On March 31, 1921, the an tempolile in question was taken from said Auto Sales do. by the bailiff of said Bunicipal Court in a replayin action instituted by the First National Bank of Sterling, Illinois, which action was subsequently dismissed by the bank, the bailiff placing the subsmobile for safe keeping in defendant's garage where it was again taken by the builiff under the replayin writ in the instant case and before it had been returned to the sate unles Co. Trump did not pay plaintiff the two installments due on the James note as he had agreed to do, - the last of which natured on Webrusry &. 1921.

Under the facts as above outlined we are of the opinion that plaintiff, at the time of the commencement of the present replevin action, May 9, 1931, did not have the right to the possession of the automobile and that the judgment appealed from

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should not be disturbed. It is elementary that a plaintiff in replevin must prevail, if at all, on the strength of his own title. It appears that, after the Jones note and the chattel mortgage on the automobile accuring it had been transferred to vlaintiff by Trump, Jones surrendered the automobile to Frump, the payes of the note and original mortgages, and it was agreed between them that Jones should not pay the two remaining installments due on the note and that Trump should pay them to plaintiff. It further appears that plaintiff was at once advised of this arrangement, sanctioned it, and in effect agreed that it would look to only Trump for such payments. a think that there are of the interested parties had the effect in law of releasing the lies of the chattel mortgage on the extendile and that when the wertoon auto sales Co. purthe will from Trump that company obtained a good title to it. The Jones note, scoured by the chattel mortgage and paving been assigned by the paper, "rump, to plaintiff, was, under the diremetances, subject to the definings evicting between said payer and Jones, the payor, the same as if the note was held by said payee. (Cabill's Stat., Chap. 95, Sec. 27; J. & A. Stat. Sec. 7692.) Furthermore, even assuming that the lien of the chattel mortgage had not been released for the reasons above stated, plaintiff did not make any attempts to take passessian of the automobile within a requestable time after Pebruary 6, 1991, the day when the lest installment on the note became due and which was not paid. (Tighley v. Childe, 11s 11). app. 173, 176.) Plaintiff knowingly permitted the sutemobile to remain in the passession of Trump and made no effort to get pessession of it until after it had been sold by Frurp on or about v reh 26, 1981, to the American Auto Onles Co.

For the reasons indicated the judgment of the Eurisipel Court is affirmed.

AFFIRMED.

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117 - 27067

DENNIS MCCARTHY.

Appellee,

vs.

WEST TOWN MARKET COMPANY, a corporation. Appellant. APPRAL PROM GIRCUIT COURT, COOK COUNTY.

225 I.A. 659

IR. PREDIDING JUSTICE ORIDLAY DELIVERED THE OPINION OF THE COURT.

befordant (appollant) seeks by this appeal to reverse a judgment for \$5,000 rendered against it on April 30, 1921, after verdict, by the Circuit Court of Cook County in an action for damages for personal injuries received by plaintiff about 9 o'clock on the morning of Sevember 21, 1918, on set Badison street at or near the intersection of Albany avenue in the city of Chicago, by being struck by defendant's auto-truck, east-bound on set Madison street. The district where the accident occurred is a closely built up business district.

The first charged general negligence in the operation of the sutemobile; the second that the entemobile was negligently driven at an excessive and dangerous rate of speed; the third that defendant negligently failed to blow a born or give any warning of the approach of the automobile; and the fourth that the defendant negligently drove the automobile; and the fourth that the defendant negligently drove the automobile at a speed in excess of 10 miles per hour in a closely built up business district of the city.

During the trial the fifth count was withdrawn. Defendant filed a plea of the general issue, and a special plea that at and just before the happening of the accident it did not operate or control the automobile by any of its servants, and that the automobile was not then being operated for or in its behalf.

Plaintiff was a police officer, then wearing civilian clothes and assigned to duty in the chief's office, and was about

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58 years of age. He had been connected with the police department of the city for over 30 years. On the morning in question he left a store, located on the south side of Madison street and west of Albany avenue, and walked east to the corner and started to cross Eadison street. As he atopped off the curb he saw defendant's truck coming east on Madison street, travelling in the south or east bound street car track, and then more than 100 feet away from him. He walked to a point about midway between the curb and the south rail of said street car track and stopped te allow the truck to pass in front of him. About this time the truck, with no material decrease in its speed, left the track and came directly towards plaintiff, who, thinking that he did not have time to return to the sidewalk and that the truck would pass behind him, stepped north, and the truck, turning north about the same time, struck him at a point between the cust and west bound car tracks and knocked him down, rendering him unconscious for a time, and causing the severe and permanent injuries complained of. The testimony was conflicting as to the speed of the truck at and immediately before the time of the collision, plaintiff testifying that it was going at the rate of more than 20 miles per hour, and the driver of the truck testifying that when he first saw plaintiff, about 75 feet away, its speed was blout 15 miles per hour, that he put on the brakes "a little," that he judged that he "could get by him," that when the collision occurred the truck was running "probably 13 miles per hour," and that of ter the collision he stopped it in about 15 feet and as quickly as he could. It does not appear that the driver, when he saw plaintiff in a place of danger, made proper attempts to stop the truck in time to avoid the collision as he could have done. He testified: "I was driving probably 15 miles an hour, when I seen a man in the street, as though he was going to cross; he looked at me and I looked at him; he kept looking at me; I kept looking at him; he

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started to cross the street, looked again and came back; this
time I was in neutral, my foot on the brake; he commenced to cross
again; I had plenty of time to turn around him; no ment by the
third time and came the fourth time; the fourth time he stopped
right in front of the car; I managed to turn so that only the
fender got him."

Counsel for defendant here contend that plaintiff cannot recover because of his contributory negligence. After a careful review of the facts and circumstances disclosed by the evidence we cannot agree with the contention.

Counsel also contend that the declaration is insufficient to sustain the judgment in that is none of the four counts upon which the case was tried are there any express averments that defendant owed any duty to plaintiff. Thile this is so, each count in our opinion avers such a state of facts that the duty of the defendant to the plaintiff clearly appears, and this is sufficient.

(Ramsay v. Tuthill Naterial Co., 295 Ill. 395, 396.)

Counsel further contend that the verdict of \$5,000 is excessive and disclosed passion and prejudice on the part of the jury. As a result of the collision plaintiff's chin was out and his back injured, and he suffered a serious fracture of the larger bone of the lower left leg near the knee. He was taken to a hespital where he remained four weeks, during which time he suffered much pain and was under the care of physicians. He was then taken to his home and received further medical transment. His knee was kept in a cast for several months and he did not return to work until May 1, 1919. In February 1980, he was assigned to travel a beat, but found that because of his injured leg he was unable to perform the duties of a patrolman and subsequently resigned his position. at the time of the trial he tratified that he was obliged to drag his leg while going up or down stairs, and that of ttimes he still had pain in the leg. Two physicians testified that there was a limitation of motion of the leg and a deformity at the knee joint,

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and that said limitation and deformity were permanent. Se are unable to say that the verdict is excessive. (Grassman v. Cosgrave. 75 Ill. App. 385, 386.)

Counsel further contend that the Judgment cannot stand because at the time of the accident McQuire, the driver of the truck, was not acting within the scope of his employment or in the furtherance of the business of the defendant. One Welleville, another employee of defendant, was rising with Meduice on the truck. They were going down town for the purpose of getting a chauffour's license for Belleville in order that he might thereafter act as a driver of one of defendant's trucks. For several weeks prior to the accident McGuire, by direction of defendant. had been "bresking in" Welleville as a chauffour, and the latter had become oufficiently proficient, in McQuire's opinion, to drive a truck. The syldence was conflicting on the issue whether or not at the time of the accident both of these employees were engaged in or about defendant's business, and whether or not defendent's president had directed them on that particular morning to go and got a license for Melleville, but it is undisputed that McGuire had general authority to drive the truck at any time for defendant's benefit or in connection with its business without asking special permission, and that the accident happened during the quatemary working hours of both McQuire and Welleville, for which time they were being paid by defendant. 's think that the question raised by defendant's special plea was one for the jury to decide under the evidence. (wangutt v. . . ". Trout auto Livery Co., 176 Ill. App. 606, 611; Di Harcs v. Chicago & Riverdale lumber Co., 220 Ill. App. 364, 361.) Indeed, the defendant by one of its offered instructions, which the court gave, asked the jury to decide this issue, and by their verdict they decided it adversely to defendant, and we think properly.

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Counsel further contend that the court erred in giving certain instructions offered by plaintiff and in refusing three instructions offered by defendant. To have examined the given instructions referred to and do not think that the court committed prajudicial error in giving them. The jury were fully and fairly instructed. Fifteen instructions offered by defendant were given by the court, and the refused instructions referred to were, we think, properly refused.

finding no reversible error in the record, the judgment of the Circuit Court is affirmed.

AFFIRMED.

Barnes and Morrill, JJ., concur.

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FRANK MLADICH

Appellee.

ve.

THOMAS MOENERLY.

Appellant.

APPBAL FAOM
MUNICIPAL COURT
OF CHICAGO.

225 I.A. 6504

MR. PHENIDING JUSTICE CHIDLEY BELIVERED THE OFINION OF THE COURT.

This is an appeal from a judgment for \$250 rendered after verdict against defendant by the Sunicipal Court of Chicago in an action for demages for the alleged breach of a contract for the sale of certain real estate situated in Chicago. Look County, Illinois. So brief has been filed in this appellate court by appellee (plaintiff).

The action was commenced on September 11, 1919. In plaintiff's amended statement of claim, filed Mavesber 3, 1917, it is alleged in substance that on July 7, 1817, plaintiff agreed to buy and defendant agreed to sell the premises in question for the sum of \$1550; that plaintiff agreed to pay for examination of abstract and preparation of deed, and to deposit in ascrew on account the sum of \$280, which mum was to be applied on the purchase price when the abstract was examined and found marchantable, and further agreed to pay the balance of 11300 on delivery of deed; that defendent agreed to furnish an abstract brought down to date and a good and merchantable title to the premises: that the parties went together to the effice of Harry C. Lemon, where plaintiff handed said Lemon \$250 to be held by him in escrey, and defendant handed him an incomplete abstract and soked him to have the Unicage Title . Trust Co. bring the same down to date; that the parties asked soid Lesmon to draft a memorandum of the agreement, which he did and banded to each

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party a copy as follows: "Chicago, July 7, 1917. Received of Frank Mladich the sum of 1250 to be applied on the payment of \$1550 for preparty known as" (Here College description of the property) "to Thomas McSneely as soon as abstract is exemined and pasced, balance of purchase price to be paid when the deed is passed. H. C. Lesmon.": that on July 36, 1917, defendant asked plaintiff for a payment on account and plaintiff handed defendant \$50, which defendant credited on the written memorandum as follows: "July 26-17. By cash 'SO. Thomas ! clasely."; that thereafter defendant recovered his shetract from the Chicago Title & Trust Co., but refused to have some brought down to date, and refused to furnish a signed doed, and informed plaintiff that he would not comply with his contract; that defendant returned to plaintiff a post office money order for the 150 paid him on July 26, 1917, which plaintiff holds subject to defendant's orders; that notwithstanding plaintiff has at all times been ready, willing and able to carry out all the terms of his contract, and has effored to do so. defendant has refused to go on with his contract, to plaintiff's damages in the sum of \$1001.

On November 28, 1917, on defendant's metion, the court struck from the files plaintiff's said amended statement of claim, and dismissed the suit at plaintiff's costs. From this judgment plaintiff appealed, and on November 6, 1918, the 3nd branch appellate court for this district reversed the judgment and remanded the cause. (Pladich v. Manuely, 212 Ill. app. 435.) In its opinion the 3nd branch court held in substance that the trial court erred in striking from the files plaintiff's smended statement of claim because the memorandum set forth therein sufficiently fulfilled the requirements of the statute of frauds.

After the remanding order had been filed and the couse reinstated in the Municipal Court, defendant, on February 25.

1921. filed an aftidayit of merits in which he denied entering

to because there is able to be a property transfer on other at their to bit the and the father as the fore and the contraction and the medical solution and the section of the sec are branch at an areas on more an alocaled branch of the at the reference of purphase price to be pute when the accepted legger recomment, that for high the data, and all all all a the made . in the Third and the superior of the total and the tampile. - pobra ha m catters with me hatdate tentucks with a com-TATE OF A COUNTY OF THE PROPERTY OF THE RESERVE OF THE PROPERTY OF THE PROPERT from a sisi access in the mont decaded, and foreverse a at language one point of read is some mean again. res Since on the Tilesiais compated bon . 24 of Directors are Lementer Decision First planeture and the alternation ATTENDATED WHEN THE THE THE PART WHEN THE PART AND PARTY AND PARTY. will be an indicate and a property of the contract of the cont to elde be annelled of the most event the second whilely relevant . we able to from the end one grander ste to more and the two gor and desired to a summary and distributed to the first terminal to the first terminal LEDVILL For more moit to b

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into any definite agreement with plaintiff on July 7, 1917, to sell the premises in question, and alleged that whatever negotiations took place about that time were merely preliminary to the drufting and signing of a regular form of a real estate contract. Defendant further alleged in substance that afterwards the parties had further negotiations as to the entering into a more formal real estate contract, but that they were unable to agree as to certain terms and conditions; that because of this and because of the unreasonable delay in completing the deal, defendant subsequently seclared the deal off and returned the 450 to plaintiff, which the latter accepted; that the said sum of 1250, mentioned in said receipt, we never turned over to defendant: that no tender of the purchase price mentioned in said receipt was ever made to him; and that said receipt by its express terms was made conditional upon the passing of the title to the premises by plaintiff.

The cause was tried before a jury. The evidence tended to support the allegations contained in defendant's affidavit of merita as to the negotiations and happenings after the execution of said receipt on July 7, 1917, and defendant's endorsement thereon of July 26, 1917. It appeared that the parties were unable to agree as to certain terms and conditions; that because of delay in the negotiations defendant declared the deal off and returned the \$50 (which on July 26, 1917, he had received from plaintiff) to plaintiff and that plaintiff ascepted the case, that defendant never received any portion of the \$250, which plaintiff placed in Leemon's hands on July 7, 1917, and that said sum was received back by plaintiff; that the title was never passed by plaintiff; and that no tender of the full purchase prior of \$1550 was ever made by plaintiff to defendant prior to the time defendant elected to declare the deal off.

Counsel for defendant contend in substance that the

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judgment is erroneous for the reasons that (1) there was no meeting of the minds of the parties as to all the terms and conditions of the proposed sale; (2) that if the receipt of July 7, 1917, with the embacquent andersement of defendant thereon be treated as a centract, it is lacking in mutuality because plaintiff did not bind himself to perform unless he should pass the title to the premises; and (5) that the contract being conditional upon plaintiff passing the title, defend at had a right to withdree his offer to sell before a tender of the full purchase price was made by plaintiff. We think there is merit in all three contentions. The second contention is supported by the cases of Belton v. Muling, 195 Ill. 384, 392; Friendly v. Alvert, 57 Gre. 599, 605; and the third contention by the case of Carcaran v. Thite, 117 Ill. 118, 122. In our spinion the judgment should be reversed with a finding of facts, and it is so ordered.

REVERSED WITH A FINDING OF FACTS.

Barnes and Morrill, JJ., concur.

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127 - 27077

FREDING OF PACTS.

We find so facts in this case that the minds of the parties did not meet as to all the terms and conditions of the proposed contract of sele of the premises, and that defendent withdrew his offer to sell the premises to plaintiff at the price of \$1500, before plaintiff had passed the title and before he had tendered to defendent the amount of said purchase price.

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DR. LESTER E. MOTEA.
ADDOLLARE.
ADDOLLARE.
GE CHICAGO.

225 I.A. 655

MR. JUSTICE BARKES DALIVERED THE OPINION OF THE COURT.

services rendered as a physician to defendant's imaghter at defendant's request. He made proof that the usual, reasonable and customery fee for such services was \$160. There was no proof to the centrary. Defendant and his doughter testified as to the services performed, as to which there was no particular controversy, but defendant offered no proof as to their value. The court undertook to decide the matter on his own experiences and rendered a judgment for \$45. It is unnecessary at this stage of development of our judicial precedings to say the court has no right to draw on his experiences in matters of which he can not take judicial notice and place them against the undisputed evidence of the case. Accordingly the judgment will be reversed with a finding of facts according to the evidence.

REVIRED WITH A PINCUM OF PACTS.

Mr. Presiding Justice Gridley concurs.

Mr. Justice Morrill took no part in this case.

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209 - 27162

FINDING OF FACTS.

We find that appellant, Br. Laster E. Bower, readered professional services for appellee, N. Johnson, and that the usual, reasonable and sustancey fee therefor is \$100, and that no part thereof has been paid to appellant.

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220 - 27177

MONTHS N. RICH. Appelles.

VH.

JOHN NYMBORE et all. Appellants AFPEAL FROM MUTICIPAL COURT OF CHICAGO.

225 I.A. 660

HR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an action of forcible detainer brought against appellants to recover certain premises described in an agreement between appelled and said appellants, which was the only evidence offered by plaintiff to sustain his right of action. We need not consider whether the agreement was a lease which gave a pellee a right to presention of the presides on May 1, 1921, as he claimed, or whether it was a more agreement for a lease, for, regardless of its character, the action could not be sustained without further proof, is being indispensable to plaintiff's right to maintain the suit that defendants' possession be shown and a refusal to surrender it on demand. (Hersey v. Festover, 11 111. Apr. 197; Freston v. Bavis, 113 id. 636; McCharky v. Helson, 179 id. 188; Octair's state v. Case, 220 id. 348.) There being no such proof in this case the evidence, therefore, was insufficient in law to sustain the judgment. It will accordingly be reversed.

HUV HIMT.

Gridley, P. J., and Merrill, J., concur.



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331 - 272.90

GRONGS VINUELBUR et al., trading or Republic Cigar Co.,

Appollares

WG.

APTHAL FROM HUNICIPAL COUNT OF CHICAGO.

PREFERRED HAVABA TOBACCO CONFACT.

Appellmnt.

225 I.A. 660²

MA. JUSTICE BANNES DELIVERED THE OFISION OF THE COURT.

This appeal is from a judgment for \$1,000 entered upon a verdict in an estion of assumpait in which appealess, trading as Aspublic Cigar Company, a partnership, claimed it sold and delivered certain eigers to appealant, on which issue was duly taken.

The centrolling question is whether the verdict and judgment were against the weight of the evidence.

Appellant is a foreign corporation engaged in the manufacture and sale of its own digars. January 25, 1917, it made a written agreement with Salter Tobin, who maintained and conducted a digar stand in Chicago for retailing digara, to furnish him a line of its digars on consignment. Tobin was to render an account of the stock on hand and rewit for sales every two weeks. In December, 1918, he was in arrows on his remittances, when a settlement was had, Tobin giving notes in payment for the consigned sevenandies he had sold and not paid for. Appellant and Tobin them entered into another like written centract under which their relations continued until July, 1919, appellant in the meantime sending goods on consignment and Tobin occasional remittances. Early in the year 1918 appellace, through George Finselber, called on Tobin and seld him a line of digars, and continued to sell and bill to him until July, 1919, when he

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AND REAL PROPERTY AND PERSONS ASSESSED.

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me many points policy follow and not billed here. Here hel benualty and

became insolvent, o-ing appelies about \$1,000, an' appellant \$9,000 on consigned merchandise, and a balance on his notes given in December, 1918. Although appelless claimed at the trial that they understood that their sales to Tobin were in reality for appellant they nevertheless brought as attachment suit against Tobin for the amount of their claim, whereupon Tobin's creditors filed a potition in benkruptcy against him which resulted in the dissolution of the attachment and settlement of the creditors' claim in the bankruptcy scort. Thereafter appelless brought this suit on the theory that the abligation was appellent's and not Tobin's.

attaching the eiger stand, as Polin's preserty, appelless claimed at the trial, on very unsatisfactory evidence, that there was another written agreement between appellant and Tolin hereby he was to conduct the eiger stand for appellant upon enlary, and that such agreement was subsequently destroyed.

which were specifically denied, and that appelless' sepresentative at the time the bailiff sought to make a larg under the attachment read to him a contract which provided for much enlary. The existence of such a contract was expressly denied both by Tobin and appellant's representative. In ellant's witnesses is stiffed that in support of their protest against sais levy the contract read was the contract for consignment. Appelless witnesses did not read or see the contract so read and it may be readily inferred that they misapproheased its import from harring it.

EXXXX read.** The cigar stand was leased to Tobin; he paid the rent therefor, kept his bank account in his own name, checked from it is paying his oreditors, remitted to appellant at the wholesses prices caterding to which the goods were billed to him.

and went through bankruptcy, paying a small dividend to his

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malificiale Vegatile in themse mentions sentify: selfentransmight have been toght too jis look of the bis ope and the party AND AS THE PARTY OF THE PARTY O L. White the bullet of corper in a factorise a first to t ... พ.ศ. 12- ท. 20ค. . พ. ก. ... มูลหลือม เสราะหมาก พ. ที่ รักษณ์ผู้สุด The same are at the control of the control of the control of the control of the ่งใน เขาแบบ โดย โดย เขาแบบที่บางหายที่ เป็น เหียเกา หนึ่ง และ THE WATER AND THE TOTAL PROPERTY OF THE TRANSPORT OF THE merelv 🚵 मध्य है के मानुबार मार्थ के अपने के प्राप्त है है । 🔭 🖫 📑 🚳 है है । 🔻 off then all pare and a second order of the track XXXXXX and in its a continuous continuous and make at the an i , as and three factions of the contraction of the c and of the later than a news of apartment deposit deposit described him or of any allowance therefor in his accounting with appellant. If appelless understood that tobin was a mere agent for appellant it is difficult to understand why they did not bring their attachment suit against appellant. That they did not is inconcistent with bringing the suit against Tobin. For is it apparent shy appellant, engaged as it was in manuf couring eigers at wholesels prices, should need or sunt to buy that slane of goods from others. Tobin was buying eigers from several dealers. In think the mediatuted facts are inconsistent with plaintiffs' theory of the case, and that the werdlet was against the manifest weight of the evidence. The judgment entered thereon should be reversed with a finding of fact that appelless did not well or deliver the goods in question to appellant.

REVERSED WITH FINDING OF FAUT.

Gridley. P. J., and Borrill, J., concur.

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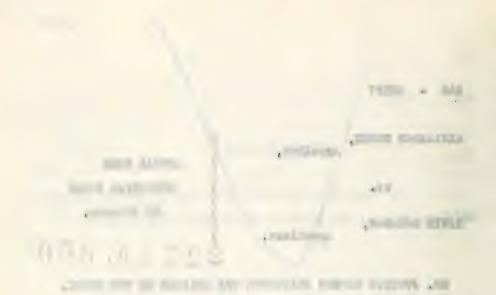


273.97 ALUKANDER ECCEN opallae. APPEAL FROM MUNICIPAL COURS V3. OF CHICAGO. DAVID MURAHAM Appellant 225 T.A. 6603

MR. JUSTICE DARWES BELIVEDED THE OFINION OF THE COURT.

This was an action in replevin to obtain passession of an auto-truck, and included a sharge of trover. Flaintiff claimed possession by virtue of surchasing the truck pt a foreclosure sale had under a chattel mortgage upon it. Defendant, who operated a garage, slaimed the right to retain possession of it by virtue of a compa law lieu for repairs he had made upon it. The court found that adjondent converted the property, that its value was \$400, and entered judgment for that mum.

Without proof of a demand, or of a justifiable excuse for not making it, replayin would not lis; and without proof of conversion, of course, trayer would not lie. There was no proof of a demand or facts encusing it, and the only evidence of conversion was defendant's retention and apparent consulment of the preparty. As the evidence tended to show that the truck owns lawfully into defendant's possession, and that he had made require thereon for which he had not been paid, and that he still hold possession of the same at the time of the foreclosure sale, and slaimed a carrier lar lies thereen for making such repairs, he had the right to such possession until his comme law lien was satisfied.



And I wanted a feet to the total of the properties of the feet of

Hence under such circumstances the svidence showed insufficient proof to suctain a judgment in trover, and accordingly the judgment will be reversed.

REVERSED.

Gridley. F. J., and Morrill, J., concur.

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SHERRY P. J., was convenient for commercial

249 - 27907

t. F. MITH, administrator of the estate of FRANCES Length V. deceased.

Appelled.

*250 -

APPEAL FROM
SUPERIOR COURT,
GOGK COURTY.

CHARLES E. FARGO et al.,

PR. BLOKE BARNED DERIVING THE OPINION OF THE COURT.

this appeal is from an order, entered May 21, 1921, on the motion of appellee, plaintiff below, vacating and setting aside an order entered December 1, 1930, dismissing this cause for want of prosecution. The motion is predicated on the misprision of the clerk in erroneously entitling the case as "Smath, adar. v. Jarge, et al.," on both the printed calendar of the trial court and the judge's docket or trial call of cases. The fact of such misprision is not questioned.

It appears that appellee's atterney consulted the trial call as so made by the clerk for Docember 1, 1970, and not recognizing his case by such title, did not attend the call, in consequence of which the case was dismissed.

It is urged he was not diligent. It is true that exercising the highest degree of diligence - which would not be required in such a matter - he probably would have identified his case by its general number or the similarity of names. It is also true that one, though exercising ordinary diligence, might be misled by a group, though similar, title of his case.

Both he and the court might properly have assumed that the clerk in performing his duties under section 19 of the Practice act, would give the case the correct title on the docket and the copy furnished for the use of the

The Property of the Land Control of the ALT BUR STREET, NO. 3 DECEMBER . , A STATE OF THE PARTY OF THE PAR all the same and t to produce a product of terrority and inverse his relation with the S of second section as white parties THE PERSON NAMED IN A STATE OF THE PARTY OF THE PAR Since an engage with the period of parties within The second of th and the second s AND STATES OF A CONTRACTOR OF THE STATE OF TH

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the docket and the copy furnished for the use of the

court, and also on the calendar which he was required by rule of court to propers. The court presumably acted upon such assumption, for in its minutes of the order of dismissal it entitled the case according to the clark's erroneous designation. Hence we think it was a clear case of entering an order under misapprehencion of the true state of facts, which probably would not otherwise have been entered, and was such an error of fact as gave the court jurisdiction, under section 89, to enter the order appealed from, it also appearing that appolles had a seritorious cause of action and exercised due diligence.

While the order prepared and apread upon the records by the clark contained the correct names of the parties of the suit, his ministerial act in that respect did not change the state of facts under which the court directed the order.

Accordingly the order appealed from will be affirmed.

Gridley. P. J., and Morrill, J., concur.

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STABLEY F. BLUM COMPANY.

Appelles.

APPRAL FROM
MUNICIPAL COURT
OF CHICAGO.

VS.

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ppellant.

MR. JUSTICE CARRES DELIVERS THE OFISION OF THE COURT.

Plaintiff, appelled, such for a balance claimed to be due for goods, etc., sold and delivered to defendant, the appellant. Issues of fact were ultimately formed both upon the statement of claim and a set-off filed thereto by defendant. Here than a year afterwards a jury was called and sworm. Fithout introducing any evidence, and without withdrawing its reply to the set-off, which unquestiousbly tendered issues of fact thereon, plaintiff moved "to exclude all evidence under the set-off." The motion was allowed. Thereupon, with ut introducing any evidence and with itsues of fact raised both as to plaintiff's claim and defendant's set-off, which stood undisposed of, the court sustained another motion of claimitiff to direct a vertical finding the issues against defendant both on plaintiff's atatement of claim and defendant's set-off, and instructed the jury to assess plaintiff's damages at 1437.54, being the balance claimed in the statement of claim.

It is difficult to conceive of a more irregular course of procedure and disregard of fundamental principles. As the record stands there was a directed vertict on the merits of plaintiff's claim without evidence heard on issues of fact that were tendered and remained undisposed of, but also on the set-off itself after it had been stricken. This the forms of common low plandings are not required to be followed in the Nunicipal Court the fundamental principles under which issues of fact are determined

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still obtain.

The statement of claim merely alleged that defendant was indebted in such sum for balance due on goods, etc. sold and delivered by plaintiff to defendent at an agreed price, amounting to \$1574.88, on which credit was allowed of \$1137.54, leaving the belance claimed. It gave defendent no real information so to the nature of plaintiff's claim. After defendant had filed two affidavita of merita, which were stricken, he made a metion for a more specific statement of plaintiff's claim, which was denied. Ultimately an amended affidavit of merits and a set-off were permitted to stand, which were substantially is the same language. Plaintiff then filed what is called an affiliavit of merits to the set-off. It pleaded excuses for non-delivery of goods as set up in defendant's affidavit of merits and tendered leaves to the statement of cot-off which could only be determined by a trial. These pleadings covered about a desen printed pages. 'e deem it unnecessary to set them out at length. As stated, plaintiff's statement of claim was as general as that in the common counts for goods sold and delivered at defendant's request. The affiderit of merits and the affidavit of set-off set up a state of facts showing/all of plaintiff's abligations were to be fulfilled before defendant was required to make payment, and that plaintiff had delivered only a small portion of the merchandise and refused to complete deliveries because it would love money in so doing, the market value of the merchandise in the meantime having materially increased, by reason of which non-delivery and plaintiff's breach of contract defendant claimed a set-off of damages exceeding the amount credited to it by plaintiff of 1774.96. To the set-off plaintiff pleaded that defendant's alleged damages grew out of separate transactions, that for a valuable consideration the contract was cancelled, that defendant refused to accept a large portion of the order, that the value of the goeds ordered had not

. Blaidy Lilley

gar in a constant gradient in a constant program, program and the control description at the and the second control of the second of the without the second or contract one private global me of a wide of ស្ត្រស់ នេះ និង ម៉ាង និង ស្រុក ស្តិស ស្រុក ស្តិស ស្រុក , Adad (£9 nor made or planted on the country to appear ារ ការស្វារ មានក្រាស់ ស្រែកស្នាំ ស្រែកស្នាំ ខេងកា នេះ ហើយ ស្រាប់ក្រាស់ និង ខេង aller in the last galaxie of the last, it committee actions where ត្រក់ គឺ គឺ គឺ គឺ មាន «ស្នីនិស្ស» ខែស ។ ម៉ែកការដ្ឋាននិស្ស ការ ការការដែលនេះ ANALYSIS AND REAL OF A STATE AND REAL PROPERTY AND A STREET, AND ASSESSED. The first that is the first of the first of the second that the second that the second the second that the second the second that the second that the second the second that t and the control of the second of the control of the ស្ត្រការស្ត្រការ៉ា ការស្នាក់ សុខស្នាក្នុងស្នាក់ ស្នាក់ ស្នាក់ ស្នាក់ ស្នាក់ ស្នាក់ ស្នាក់ ស្នាក់ ស្នាក់ ស្នាក់ •ដែករៈ ក្រុមស្រុក ក្រុម ប្រសាធិនរបស់មិនរបស់ "មើន+ណ៍កែ និសាធិន។ 🚺 ភបា ភ 🕠 មក។ មាស់ - អ្នកស្នាប់បាន ស្រុកស្នេក ស្រុកស្នេក ស្រុក ្រាំ មួន ណា ត្រាប់ថា នេះ នៅស្រែង ២ សេសាសាស្រែ ស ស ប្រាប់ and italian the more of the particle of the particle of the second second second The little of the second second to the fact that its also it for a surface construction on also still our decaptions to tedt the little of the law alternate and at you are invested as of the control of a control of the fire of the control of the cont The second of th 😘 សា 👉 ប្រាសាស្រ្តបាន កា ភា ២. ១គ្រឹង ១៤១ 🗺 🗽 😅 " man a "to premial to the plant was a first of ground and process of ground and and the state of t and the contract with the contract of the cont All the latter was a second of the latter than the second that the latter than See and the contract of the second section where approximately and the property of the property the state of the party of the believed

greatly increased, that slaintiff did not refuse or neglect to deliver the goods until defendant refused to pay for merchandise previously delivered, and other matters either raising a question of fact directly or by confession and evolunce. It is very clear that these issues could not be disposed of an a mere motion.

But treating plaintiff's motion to strike the set-off as in the nature of a demurrer, it admitted the allegation in the statement of set-off that plaintiff refused to deliver on accunt of less or an increase in the value of merchandise. His admission on this allegation therefore estapped him from setting up a different ground for non-delivery. (I. Q. N. A. DO. v. Teitz. 214 III. 350; 21 Corpus Juris, p. 1222.)

Defendant's affidevit of merits and affidavit of setoff show that the claim for darages arose out of the contract sued defendant In such a case there can be no question that the would have the right to reduce the claim of plaintiff by shawing the damage suctained by him for plaintiff's failure to fulfill his contract. (Nichards v. Tham, 57 Ill. 222; Minnesota Lumber Co. v. whitebreast Cosl Co., 160 Ill. 84.) And in this State the fact that damages are unliquidated is no obstacle to setting them off when they acome out of the same subject matter on the demand against shick they are offered. (Sargeont v. Hellegg, 5 Oill. 275; Hertshorn v. Kinsman, 16 Ill. App. 856; Saudder-Gale Gracer Co. v. Lussell. 65 Ill. App. 281; Holmen v. Vokennen, 130 Ill. App. 320.) Inaumuch, therefore, as defendant's affidavit of merits presented a complete defence to plaintiff's action, and the attement of act-off a good and sufficient statement of the cause of oction on behalf of defendant, and as plaintiff himself tendered issues of fact on the letter, it was error on the part of the court not to hear evidence on the case and submit the cause to a jury for a determination of the issues of fact.

Plaintiff cites sutherities where the vendor is held to

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default, and that the purchaser in such a case cannot recover demages accruing to him after such default. These authorities are not applicable to the facts set up by the defense, which are to the effect plaint! I was first suilty of a breach of a nirect. Accordingly the judgment will be reversed and the cause remanded with directions to try the issues of fact presented by the pleadings.

ARVERSED AND REMANDED.

Gridley, F. J., and Morrill, J., concur,

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MARY JUEN O'R URER, a liner, by Thomas A. A'Asuras, her heat Friend,

Appaller.

VS.

KAMPHALL FIRTH & QO., & Corporation,

bootlent.

APPRAL FROM SUPERIOR SUMPS

225 I.A. 661~

ER. JUSTICE BARNES DELIVERED THE OFFICE OF THE COURT.

brought by a minor by her man friend, against appoilant corporation. The declaration sets up, among other material facts, that in the building conducted by appollant as a store was a play room or recreation room for enildren, conducted by defendant, for their ammement, entertainment, etc., and that the minor was there at appollant's invitation, and that appollant wrongfally allowed and permitted a recking horse, on which the child was riding in said room, to become defective, etc., whereby the child was caused to fall and be thrown from said rocking horse to the floor and injured. The jury assessed plaintiff's damages at \$1,000. A resitting its purpose to appeal, whereapon the judgment was entered on the verdict.

Appellant ergues that the allegation that the minor was there "at the invitation of the defendant in said play room" called for proof of an express invitation. In this we do not concur. While there was no competent proof of an express invitation, yet in view of the state of the pleadings alleging that defendant conducted and meintained such a play room for the public, of which there was no special denial, an invitation to use it would be inplied. That being the case the rule invoked by appellant which

NAME AND ADDRESS OF THE OWNER, TH

 relieves a private owner from any luty to a licenses except to refrain from actual, wilful injury towards bim is not applicable.

It is next urged that there was no proof of defendant's neglicance. The evidence shows that while the child was rocking on the rocking horse the handle or "seres" which, in the course of the recking she took note of, been a detached from the horse, causing her to fall backwards on the floor. There was also evidence bending to show that defendant had a servant in attendance. Defendant put to no proof denying or respecting the maintenance of the room. Taking, therefore, the admissions of the pleadings, and the fast that children of such tender years are incapable of exercising due care for themostres, and that alabytiff had an attendant present, probably for that reason, we think the fact that the handle, which the child was supposed to take hold of to hold herself on the rocing horse, became detached while she was so receing, satablished a prime facte ones of negligenou. To be mure, the evidence on this subject was monger. Jut we think it follows from much state of the record that defendant would be expected to maintain appliances reasonably safe for the purpose for which their use was invited, and therefore was required to emercine ordinary care to see that the handle on the recking herse, on which safety of the child in using the borse apparently depended, was reasonably secure.

but the judgment was excessive. Counsel for appelled himself was disposed to accept the trial Judge's conclusion to that effect. The only permanent injury from the accident was a sear resulting from sewing up a laceration about thresoquarters of an inch long in the fold of the cyclid which is sourcely visible, the other consequences being temporary and not engine.

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If plaintiff will resit \$650 the judgment will be affirmed, otherwise it will be reversed and the cause remanded.

APPEARED ON DESERTITUES.

Gridley, P. J., and Morrill, J., cencur.

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306 - 27264

PHOPLE or rel. JAMES LYNCH.

VS.

ON APPEAL OF A. H. BRACHER et al., Appellants. APFRAL PRON
CINCUIT COURT.
COOK COUNTY.

25 I.A. 661

MR. JUSTICE BARNES DELIVERED THE CPINION OF THE COURT.

This is an appeal from an order awarding a writ of mandamus, and directing the president, clerk and trustees of the Village of Elmwood Park to proceed and appoint officers to fill certain offices that had been duly created by ordinance of said village. One of the appellants stood by his overruled deserver to the petition, and the other three filed an enswer thereto. As the answers presented no traversable facts, and thus practically admit the averments of the petition, no evidence was heard and the order was entered on the pleadings.

It is contended the cause should have been submitted to a jury, but in view of the effect of such answers there was nothing for a jury to decide. hile it would have been better practice on the part of patitioner to have raised the issue of law by demurrer, yet as the answer presented no issue of fact for a jury we think there was no error in entering the arder, as aforesaid, on the pleadings.

The officers directed to be appointed are such as Article VI of the Cities and Villages Act prescribe may be appointed by the mayor with the advice and consent of the council. The same power and duties thus given to a mayor are also given to the president of a village. (Cahill's Stat. 1921, par. 1196.)

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The provision of the order is that in proceeding to appoint and in appointing such officers the president and trustees shall act jointly, at a meeting of the board, "said president and each trustee having an equal right to nominate and vote" upon the nomination of persons to be appointed to such offices. It is urged that in this respect the order is erroneous because the president under the section of the statute last cited can vote only in case of a tie. We think the order will not be misconstruct, and that it contemplates nothing more than proceedings according to said article VI.

It will therefore be affirmed.

AFFIRMED.

Gridley, P. J., and Morrill, J., concur.

HE SELECTION OF THE PROPERTY AND ASSESSED OF THE PROPERTY AND ASSESSED ASSESSED AND ASSESSED OF THE PROPERTY O

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27298

LOTIS H. SINGEL. trading as L. SINGEL & COMPANY.

VS.

DAVE GREENBURG, truding do Green's Style Shop, ppellee. APPEAL PROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OFINION OF THE COURT.

Appellant sued for the purchase price of three coats delivered to appelled on the latter's verbal order. The order was to duplicate a previous written order specifying ctyle, color, size, etc. Appelies rejected the coats delivered under the verbal order, claiming they did not correspond to those ordered and received under the written order. The ther the color of the coats delivered under the verbal order was like the color of the coats delivered under the written order was the main isoue. The case was heard without a jury. In determining that issue coats delivered under both orders were inspected and compared by the court, and the court found that there was a material difference in the color which justified appelled's rejection of the coats in question. The coats are not here for our inspection and hence the trial court's facilities for determining that question were superior to sure, and we sanust say from the evidence that the trial court reached a wrong conclusion.

Appellant contended that it was difficult, if not impossible, to obtain two bolts of sloth of precisely the same color. But if, as the court found, he undertook to duplicate the previous order the fact that he could not obtain a bolt of cloth of precisely like color would not excuse performance according to his undertaking.

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The court having found from sufficient evidence that he did so undertake, and that the goods delivered thereunder did not conform in color to those delivered under the original order, the judgment will be affirmed.

AFFIREED.

Gridley, P. J., and Morrill, J., concur.

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361 - 27319

DENNIS J. WGAN. Bailiff.

appollant,

THE.

GEORGE SZABO et al.

Appellees.

APPEAL FROM MUNICIPAL COUNT OF CRICAGO.

225 I.A. 6501

MR. JUSTICE BARRES DELIVERED THE OPINION OF THE COURT.

This is a suit on a replevin bend in which the court found and accessed plaintiff's durages at \$75.

appellee Szabe replevied an automobile from Canzler. for whose use this suit is brought. The former failed to prosecute the replevia suit with effect and a writ of return habends was issued for return of the property to Canzler. It not having been returned this suit was brought.

There were two chattel mortgages on the automobile. Ganaler took possession under one, and Snabo replevied the mate-mobile from him, claiming under the other which was a prior chattel mortgage. The amount due with interest on the note secured by the latter was \$545. There was uncontradicted evidence that the automobile was worth at least \$950. At such value it was sufficient to satisfy Baabo's claim and leave \$455 towards actisfying Sanzler's. The 575 assessed as damages by the court was for attorneys' foce, is curred in the replevin suit. That this sum was reasonable was undisputed. Upon this state of facts it is not apparent why the court did not assess plaintiff's demages to include in addition to said attorneys' fees said sum of \$435, making a total amount of \$510.

while we do not think appellant's contention that imabo did not have a valid prior lies on the automobile is well taken, yet Canzler being entitled to the automobile under the writ of returns, or the value of the same, is also could not

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contest his claim to the property, but sould only claim in mitigation or reduction of damages what was due him under his prior lies, namely, \$515. As said in _tevinon_et al. v. Earnest. 80 Ill. 513:

"By permitting the suit to be dismissed he lost all right to contest the plaintiff's claim to the property except that seved to him by the statute, which was to plead and prove his title to the property in mitigation of demages. Beyond this he could not contest the plaintiff's title." (p. 519)

See also Bierna v. Columbia Typewriter Nfg. Co., 179 Ill. App. 59. Se need not, therefore, discuss appelless' contentions which disregard this interpretation of the statute. Accordingly the judgment will be reversed and judgment entered here in favor of appellant for 1810, with a finding that such was the amount of the damages.

REVERSED AND JUDOMENT HORE FOR \$510.

Gridley. P. J., and Morrill, J., concur.

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361 - 27319

FINDING OF FACT.

by appellant for failure of appellee George Szabo to return the automobile in question was \$500.

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391 - 27549

JOSEPH COMUNE et al.

appellants.

73.

APPEAL FROM

OF CRICAGO.

L. J. KITE ot all.

Appellmes.

MR. JUSTICE BARRES DELIVERED THE OPISION OF THE COURT.

Appellants such for a balance of \$468 on shipments of merchandise to appelless, amounting in value to \$2,072.72.

The defense was accord and satisfaction, and that a portion of the goods were not according to sample and were returned. The case was tried before the court without a jury which decided for defendant, holding that the facts showed an accordant satisfaction.

Appelless returned a portion of the goods and cent appellants their check for \$1,564.08 marked "payment in full of second to date," explaining in a letter transmitting the same that the goods were not according to sample. Appellants returned the check, and appelless sent it back again. It was then retained by ap cliants for about three weeks and cashed. The evidence unquestionably shows that there was a bone fide dispute between the parties as to whether such goods conformed in material and color to those ordered. It is conceded that if the check in question was accepted under these conditions the court's conclusion is correct.

The main controversy was whether the check was cashed unconditionally. After the matter had been in ap ellants' hands for nearly three weeks they turned the check over to their attorney, who had a telephone conversation with one of the

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defendants. Said attorney claimed that the defendant said: "Your people use the sheek and we will litigate in regard to the balance." The defendant with whom the conversation was had testified: "I said we could use the money if he wanted to send the check back but he said he couldn't do that as he had no authority for it. He said he was going to write Jos. Cohen a sons to accept that merchandise back and use our check. I told him to do as he pleased." The court sydently accepted appellers' version of this conversation and we cannot eay it was in error in so doing. If appellants did not intend to accept the check as payment in full in view of the return of part of the goods and the sparently bone fide dispute as to their quality and color, then they should not have retained the check and cashed it under that state of facts. The law on this subject is too well settled to need citation. The decisive question of foot in controversy to so above stated. That being decided against appellants the court on the rest of the evidence reached the correct conclusion. Accordingly the judgment will be affirmed.

AFFIRED.

Gridley, P. J., and Morrill, J., sencur.

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140 - 27092

Mensal & Pallinas. Plaintiffs in Sprop,

VB.

WILLIAM JACKSON, Receiver for The Chicago & Mastern Illinois Railroad Company, Wefendant in Fror. THEOR TO
SUNICIPAL COURT
OF CHICAGO.

7 ETA 6553

MR. JUSTICE WORRILL DELIVERED THE OFFICE OF THE COURT.

Plaintiffs in error seeks the reversal of a judgment of the Municipal Court of Chicago in favor of the defendant in an action brought to recover the value of 9,962 pounds of oats which are alleged to have been lost in transit between Menning. Illinois, and Cairo, Illinois. The case was tried by the court without a jury.

The only facts before the court were those included in the stipulation of the parties. He eral evidence was heard upon the trial. The facts are tasselors undisputed and the controversy relates solely to the law applicable to the case. As shown by the stipulation, the plaintiffs, during March and April, 1920, shipped from Henning, Illinois, to Cairo, Illinois, over the railrand operated by defendant, three carloads of eats of the aggregate weight of 179,840 pounds. The grain was weighed and the cars loaded by plaintiffs, after which the car doors were boarded up to the roof. The defendant had nothing to do with the loading of the cars. Thereafter the cars were inspected and sealed by defendant's egent, who then delivered bills of lading to plaintiffs showing the weight of the respective shipments. These bills were filled out by plaintiffs, who inserted all accessary data, including weights, so that only the signeture of the agent was required. Upon the arrival of the cars at Cairo and before delivery of their contents to consignee, the cars

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were inspected by the Cairo Beard of Trade and the original scals were found intact and unbroken. There was no evidence of any apparent leakage from the cars or that the cars had been tampered with in any way. The cars were unloaded and their contents seighed by the consignee at Cairo, who found a shortage of 9962 pounds of cats, the value of which is stipulated to be 3252.15. The trial court held "as a matter of law, that under the evidence as stipulated in this case, the finding and judgment should be for the defendant."

The only question presented to this court for determination is, whether or not the stipulated facts justified the conclusions reached by the trial court. The stipulation contains no admission by the defendant that there was an actual shortage. It shows that at the beginning and end of the brief journey, the cars were in perfect condition. The scale were intact. There was no evidence of leakage in or repairs to the cars. The stipulation further shows that the weight of the grain, which by the bills of lading was "subject to correction," at the time of the loading was determined by plaintiff's to be 179.840 pounds and that the "outturned weight" of the contents of the cars as determined by the consignee showed a shortage of 9962 pounds. The stipulation does not show the actual weight of the grain either at the beginning or end of the journey. The perfect condition of the cars at the inception and close of the journey and the stipulated fact that the care could not be opened without breaking the seals precludes the theory that there was any leakage or theit of the contents. These facts warrant the inference that the alleged shortage was due to mistakes in determining and recording the weight of the grain or to differences between the scales of plaintiffs and those of the consignee. The trial court was justified in reaching the conclusion that "under the evidence as stipulated," the plaintiffs could not recover.

The judgment of the Municipal Court is affirmed.

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IDA OLSON,

Defendant in Error.

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MONTH ANTHICAS UNION. corporation. Plaintiff in Tror.

ERROR TO MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE MORBILL DELIVERED THE OPINION OF THE CHURT.

The plaintiff, who is defendant in error here, brought suit October 34, 1919, in the bunicipal Court of Chicago to recover the belance alleged to be due her upon a benefit certificate issued by the Worth American Union, a fraternal beneficiary society incorporated under the laws of Illinois, upon the life of her husband, John Olson. The defenses urged are that plaintiff voluntarily settles her claim against the defendent, mirrendered the certificate and gave a full release, which procludes her from maintaining the action, and further, that the insured visiated the by-laws of the defendant by the excessive use of intoxicating liquors, thereby impairing his health and consing his death. There was a jury trial, resulting in a verdict and judgment in favor of plaintiff for \$539.40, the balance due on the certificate, the defendant having previously paid \$460.60 in connection with the alleged settlement.

The benefit certificate was issued Documber 1, 1898. It is undisputed that all assessments and dues were paid as required by defendant's by-laws. The amount of the certificate was 1,000. The insured died at the Chicago State Heapital Revember 10, 1918, from corebral arterio scleresis. The predisposing cause of his death was bronche preumonia. The certificate, among other things, provided that the wamber must comply with the laws, rules and regulations governing the society, all of which sere made a part

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of the contract; that the contract should be incontestable after two years from its date, except for non-payment of dues, engaging in prohibited occupations and becoming habitually addicted to the excessive use of intexideting liquors, centrary to the by-laws of the association. The by-laws provided, in substance, that any member of the order who become a drunkard or used intexicating liquors to the impairment or destruction of his health thereby invalidated and annulled his membership in the order and that in such case neither he nor his beneficiary would be entitled to any of the benefits or paymonts provided by the certificate, and further, that if on the death of a member it should appear that his death resulted from or was caused by or from the use of introcisting liquors, all rights and claims under the curtificate should be forfeited and the beneficiary should be paid in lieu thereof a sum equal to the total amount actually paid by the member to the martuary and reserve funds of the order. The application signed by the insured contained a statement on behalf of the applicant that he was not then addicted to the excessive use of intexlenting liquors, and if he should become so addicted. By so doing he should forfeit and torminate all rights under the certificate, and an agreement to comply with all of the laws, rules and usages of the society. In reply to questions put to him by defendant's medical examinar, the applicant stated that he used shiskey, beer and other kinds of wint and li-mora; that he consumed daily an average of one glass of beer and two glasses of whiskey, the size of the glasses not being stated; that he was accustomed to take a drink of whishey or brandy before breakfast deily; that it had been metemory with him to take a drink of whiskuy b fore breakfast for the past twenty years and that he generally took another before supper in the evening, but he never took more then two glosses daily. These ensure were sufficient to advice the incurer that the applicant was a user of interioriting liquors to mich

್ಯಾಕ್ - ಆರ್. ಇತ್ರಾಸಾಧಾರ್ಯ ಮು. ಅತ್ಯ ಚಿನ್ನಾರ್ಯಕ್ಷ್ಮಿ ಆರ್. ಮಿ. ಇದೆ ಭಾಗತ್ತಿ ಮಾಡುತ್ತಿ ಮಾಡುತ್ತಿ ಮಾಡುತ್ತಿ ক্ৰাক্তিয়ের পুরুষ্টে বিজ্ঞান ক্রান্ত হল্পি চ্ছান্ত্র কুল্লালি ক্রান্তি ক্রান্ত els or establish relief entweet a commence of the entre the form entimed and it will be a parray to refront atal to are evin the sections in the two sections at a section as the section of ing the grants, flower or again was an ensured digit to the out of to deals on the longitude on an arrange and of to the transfer to a transfer does the early walkers have before was an fift to an older exciptioned abl was well as Pick to a sixter product on production of all ballions always in whitead left to কৰা কৰা । তেওঁৰ পাৰ বুল মুট্টাৰনৰ বঁটা প্ৰাৰ্থ কৰা হয় প্ৰাৰ্থ কৰা কৰিছিল। প্ৰাৰ্থ কৰা . The first of the contract to the contract of the contribution of these management will strate taking the officer and in of 1 p. 1 p. . Therefore and a si bios on a large graduits - ---with a training subject of subject of the valuable N Junioren i de comi i Africa de la comitation de la comita នានាស្នា នា ស្ត្រីសារស្នាក់ ការស្នាក់ ស្ត្រីស្ត្រីស្ត្រីស្ត្រីស្ត្រីស្ត្រីស្ត្រីស្ត្រីស្ត្រីស្ត្រីស្ត្រីស្ត្រី a ming a figer of the contract of the little that are contact to timila ija satajantaj una sistenta elimeta od prijab pe est "ku lilika 🗀 the correct blance, and to all respect to reprile this old of the IN MARK CONTINUES OF PERSONS AND ADDRESS OF THE PARK SHARE WAS to be a real property of the contract of the property of the contract of the c and the growth of the biline and of the all the control of the growth to be the The second of the contract of the second of i digin arak uga kepadan anin aga da akti akti juma da distriction in the course of the factors a court of the brokesses and the contract of the entire of the state tions beautiful the received and received and the received the and the matter end of the present the matters were the tive setting of the 1941 is a companies of the contraction of the cont ាំស្រ ស្រី មានប្រជាជាក្រុម ប្រជាជាក្រុម ស្រុក្ស សមានក្រុម ខេត្ត ស្រុកសង្ស័ ក្នុង សុរីស្រុកស្រី សូមនៅថា កុម្មានក្រុម

an extent as to indicate that he had the habit. Under present standards this use would be regarded as excessive. With this information before it and with the knowledge that the habitual use of alcoholic liquors for many years was likely to increase with age rather than to lessen, thereby causing a possible deterioration in the physical condition of the insured, the company caw fit to accept the risk and received the payments of the insured for a period of twenty years. Under such diroumstances the insurer cannot insist upon compliance with the requirements of the society as to abstinence from the use of alcoholic liquors. These conditions of the contract were for the benefit of the insurer and the insurer could waive them. It is a fair inference that the assessments and dues were paid for twenty years upon the understanding that the drinking habits of the insured would have no effect upon the validity of the certificate. Germania Life Ins. Co. v. Kochler, 168 311. 203; A. O. U. W. v. Davidson, 191 . . . 961; Mutual Life Ins. Co. v. Stibbe, 46 Md. 302: Miller v. Mutual Benefit L. I. Co., 31 Ia. 216. The evidence was far from conclusive that the actual cause of the death of the insured was alcoholism. It was a question for the jury to decide and they were advised by sundry instructions, given at the request of defendant, to the effect that there could be no recovery if the jury believed from the evidence that the death of the insured was due to the execusive use of intexicating ligners. The verdict of the jury in this respect was not contrary to the manifest weight of the evidence.

It is also urged by plaintiff in error that the beneficiary voluntarily settled her claim with the North American Union and that having accepted the sum of \$460.60 in settlement and surrendered her certificate, and having given the North American Union a release of her claim, she connot maintain an action on the certificate. It is urged that there was an honeat dispute between her and the society as to the validity of her claim and that the claim was disputed in

on them in the students of a deal sold of the bar of the state of station with the partitioner or because of the trip of the to so los finiates al agentadas se time todad at another alle son after invested at virtal any attention that sengell billialedly of political maintains addition a parameter of the training for the second second and the second sec force of the transfer out of the contract to the state of the state of to make the product of the block of the both contract the felan de dise en de la compania del compania del compania de la compania del compania de la compania de la compania della della compania dell magnati, a stora grainsa nel la situación de ser asió el millo peleten out to mastritare renut versumai titudeole te are ar - Principle of the bismore residence to the best to the off the state of the contract added to the contract and angular of the at a lad of a complete that that a marriage of a fit area, which will not the As at a falle or and relative to the area of the contract of t handlen at the state of the same than a section of vii to il a di commissione de la commissione de la commencia d of and it grade and we had not been all and indicates in the ్ిక్ చిక్కు కోత్రాలు ఆగా నా చేస్తున్నారు. కాట్లో కేట్లోన్ ఉద్ద కేస్ ఇక్కు కూర్పోట్లో in ... i same a manual ent la capación esta de significación de senta esta la compacificación de la capación de the for the first the contract that the first the section and one by realized faithful and the constant for the Principle and all their

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good faith by the defendant and the parties made a compromise and settlement which should be mutained. It is settled law that where there has been a compromise in good faith of unliquidated or disputed demands, and where there is an nonest difference between the parties as to the amount due, such an accord with satisfaction is binding upon the parties. Smith v. Mutual R. F. L. A., 140 Ill. App. 409; Mayes v. Massachusetts Mutual Life Ins. Co., 128 Ill. 626. The circumstances connected with the allegadsettlement herein do not bring the case within this rule. The claim of the beneficiary was liquidated. It does not appear from the evidence that she accepted the sum of \$460.50 in settlement of an honest dispute between her and the society. The evidence shows that after her imsband's death she called upon the officers of the vociety and requested payment of the certificate, but that she encountered numerous delays before receiving any answer whatever and was informed by these officers, in substance, that she had no valid claim against the racisty. The did not act under the advice of councel. Under such dircumstances, it was natural for her to take what she could get and to sign any paper that she was maked to sign. The case comes within the rule established in other cases of a similar character, which held that an acceptance by the creditor of a sum less than the smount due in full setiaf stion of the debt is a discharge only of so much of the debt as is equal to the sum received. Farmers' and Lachanics' Life Assn. v. Cains, 224 Ill. 500. The eattlement and release were illegal and unexthorized and the general principle applies that the acceptance of a sum less than that actually due cannot be a entisfaction and will not operate to entinguish the whole dobt, as there was no consideration for the relinquishment of the excess due beyond the sum paid. There was nothing to show the possibility of any benefit to the party who relinationed a legal right. Hoyes v. Massachusetta Life Ins. Co., supra.

The cortificate also contained a clouse making it incontestable after two years from the date thereof, except for

the representative a some experience will be assemble with of reliabling while hell had become at the presidence of Linear made president because it was the bear in good failed at the later to be and the bear the weight a segment out mostly die mer balet bedriebte ben jihi vili i nashevisa. Prim kabupa miribing jesh ingtor. general tradition of the state of an interest of the term and n v 2000 and thi , and among restal decorate attent . In the street of the contract of the contrac No game the state of the state william to the state of the state of the second of the state of the st y a property of the first of the continue of t the course of the course of the property and the property of the course of th THE RESERVE OF THE PARTY OF THE t iver pur ha and i err till och sytetoen och immiega mielo And a feet of 1. this can be a strong to work the control of the control of ward to take the first of the terms of the first term the sea of the season of the sea tilber: Te terri tidio et redetifeles elle ete miglio sumpe en <u>ាំ នៅ ខេត្ត ហ៊ុន នេងដោយការ ដោះ ប្រធានការប្រជាពល សាក្សា នៅតែក ទៅពេល ស្ថាន</u> of the court library to a project Their all editions and a finance of the figure i par la company de la the property of the party of th THE RESIDENCE AND ADDRESS OF THE PARTY OF THE U.S. SCORE SOLUTION ් සිතකි. මත යන්න විසින් වෙන සිත කිරීම සිත සිතින් සිතුන්න සිතින් විසින් විසින් සිතුන්න සිතුන්න සිතුන්න සිතුන්න and the second of the second o all all recommend A restail to the term of the term and the vigor down. A king was get to the el contra en un un el min de continue per el est establista que ACCORDED TO THE STREET, AND ASSESSED.

ក្រុម ជីព ពលក _{ស្}ទៃស្រានគ្នា (2) (១១៩ ២៤៧) ប្រធានក្សា (១១៤៧) គេស្^{រុ}ង (១៩៤៤ ១៩៤៣)

non-payment of dues and the insured becoming habitually addicted to the excessive use of intexiculing liquors, centrary to the laws, rules and regulations of the association. The substance of the by-laws upon the use of intexiculing liquors has already been stated and the verdict of the jury under the instructions of the court, which were favorable to the defendant, established the fact that the death of the insured was not due to the excessive use of alcoholic liquors.

We find no roversible error in the instructions given or refused by the court or in the rulings of the trial court upon questions of evidence.

The judgment of the Municipal Court is affirmed.

Gridley, P. J., and Barnes, J., concur.

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GEORGE F. LOVDALL,

poslice.

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MATHIAS M. ZAKOWSKI,

Appollant.

APPEAL FROM COUNTY COURT. COOK COUNTY.

225 I.A. 602⁵

MR. JU TION WORHELL INLESS WITH THE OPINION OF THE COUNT.

This is an appeal from a judgment of the County Court of Cook County against defendant, who is appellant here, for \$417.67 and costs. Flaintiff's claim is for services rendered by him as an architect is preparing plans and specifications for a bungalow which defendant proposed to creet in vanstem, Illinois.

The declaration alleges and the proofs show that defendant employed plaintiff to make the plans and specifications in question and that plaintiff fulfilled his undertaking by preparing the preliminary ctudies, general drawings, plans and specifications for the proposed atructure. He also took estimates for its casstruction, the lowest bid received from a responsible centractor being 116,707. It is undisputed that the architect was to be paid for his services, including superintendence of the construction work, an amount equal to five per cent upon the cast of the building as determined by the lowest bid received from a responsible contract. Defendant did not proceed with the erection of the building on account of the cost, which was more than he had anticipated. By reason of his failure to proceed, plaintiff claims that in scrordance with the satablished custom smeng architects, there became due and owing to him an amount equal to two and one-half per cent of the lowest bid from a responsible centractor. The judgment was in conformity with plaintiff's contention, based upon an estimated cost of the building of \$16.707. The plans and

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specialistical were delivered to defendant and retained by him. the
The defence is, that under / arrangement with the architect for
his services, the latter was limited to the preparation of plans
and specifications for a bungalow which was not to exceed in cost
the sum of \$12,000, and was not authorized to design a building
of the character described, regardless of its sout, and that plaintiff agreed not to make any charge for his work if he was unable
to build the proposed house for a sum not exceeding \$13,000. This
was the only assential fact in controversy between the parties.

It will not be necessary for us to review the evidence in detail, for the reason that the only ground arged by appellant for a reversal is the alleged errors of the court in giving certain instructions which were requested by plaintiff. Two instructions were offered by plaintiff, and at his request, given to the jury. The first of these was as follows:

"The Court instructs the jury, that if you believe from the evidence that the defendant employed the plaintiff as an architect in and about the preparing of plans, the writing of specifications for the construction of the proposed building, the more fact that the building was not exected does not bur the plaintiff's right to recover."

This instruction had a tendency to mislead the jury. It dealt with only one feature of the evidence. It contained no reference to the essential question of performance of the contract by plaintiff and inferentially advised the jury that the only questions involved in the case were the employment of plaintiff by defendant and the failure of defendant to proceed with the construction of the milding. It did not refer to the only issue in the case and when considered in connection with the other instruction of which complaint is made, the jury were likely to reach the conclusion that plaintiff was entitled to recover regardless of the evidence introduced on behalf of defendant.

The other instruction given at the request of plaintiff is as follows:

డిగాకుకు ఎక్కొమ్కారం ప్రాథానికి రాజికి పడుగాయించిందిని విశ్వరం ఉంటేకి కా మందార్కింది అనికి ప్రాథానికించి ప్రాధానికించికి అనికి పడుగా అందినికించికించికించికి పడుకి పడు అని ఎక్కుమ్ కేది అడుకు ప్రాధానికి అనికి కారు మందిని అనికిప్పుడుకు ఉంది. అను కోడ్ టెకెక్కార్కారు కారుకి అనికి అడికి ఉన్నాయి. మందిని అయికారుకుండి ఎక్కు ఈ కారక్క్ క్రాక్ ఆక్క్ కార్కెక్కిరికి మందిని అనికి కారక్ ప్రాథానికి చెరికి కారుకుండి చెరికి మందిని అనికి

DESCRIPTION OF PERSONS AND PERSONS ASSESSED.

"The Court instructs the jury that if you believe from the evidence that the defendant employed the plaintiff as architect to draw plans, make preliminary studies and specifications, and if you further believe from the evidence that the plaintiff was to receive a fee of five per cent (5%) based upon the total amount of the lowest bids received from responsible contractors, and if you further believe from the evidence that the defendant abondanced the work after the completion of the plans, specifications, etc., and that the defendant agreed to pay the plaintiff two and one-half per cent (5%) of the lowest bids received from responsible contractors for the making of preliminary studies, general working drawings and the writing of specifications, the Court instructs you to find the issues for the plaintiff and against the defendant."

This instruction was prejudicial and misleading. It was peremptory and directed the jury to find for plaintiff without reference to the only issue of fact involved in the case.

The plaintiff in this case was entitled to recover if the jury believed that he was employed by defendant to propare plans and specifications for the building and superintending its construction without stipulation as to the cost of the proposed building, and that defendant agreed to pay plaintiff a commission of two and one-half per cent upon the cost of the building for preparing plans and an additional two and one-half per cent for superintendence. and that plaintiff propared the plans and specifications in accordance with this agreement, but defendant falled and refused to proceed with the construction through no fault of plaintiff and without justifiestion. The second instruction above quoted was also erronsous, because it directed a verdict without reference to the one disputed issue of fact in the case and to facts and circumstances disclosed by the evidence and upon which defendant relied. The giving of an instruction for the plaintiff, ignoring matters of defense of which there is evidence fairly tending to prove, is reversible error, and a minleading instruction of that character is not corrected by the giving of correct instructions on behalf of the opposing party. In the case at ber there was a conflict in swidence on a disputed insue of fact rendering it essential to a clear understanding and proper determination by the jury, that the instruction schould be accurate

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statements of the law, applicable to the evidence before them and free from defects which would tend to mislead. Garrell v. Fayson 170 Ill. 217; sontgemery Soal Co. v. Barringer, 218 id. 327; Mulcahy v. Milford. 213 Ill. App. 423. A defective instruction which directs a verdict is not cured by other instructions correctly stating the law. The instruction should have embraced all the facts and conditions essential to the verdict.

In discussing these instructions, it is argued by appelled that the court did not err in ignoring in its instructions matters of defense supported by evidence tending to prove them. In inspection of the enthorities cited by appelled shows that the rule for which appelled contends was subject to the limitation that the instructions, taken as a series, fairly and impartially state the law. Appelled overlooks entirely the sell settled rule that a defective instruction directing a verdict is not cured by other instructions which correctly state the law. Partridge v. Outler, 168 Ill. 504; Illinois Iron and Metal Co. v. seber, 196 id. 526; Rattner v. Chicago City Ry. Co., 233 id. 169.

For the errors above indicated, the judgment of the County Court is reversed and the case remended.

REVERSED AND REMANDED.

Gridley, F. J., and Barnes, J., concur.

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DESIGNATION OF THE PERSON AND ADDRESS.

191 - 27147

A. B. C. CHEMICAL COMPANY,

Appellee.

APPRAL FROM MUNICIPAL COURT OF CHICAGO.

VS.

C. F. WISHE et al.

Appellants.

225 I.A. 663

MR. JUSTICE MORRILL BULIVERED THE OFINION OF THE COURT.

The original statement of claim filed herein alleged that defendant, which was the Franco-American Chemical Corporation, was indebted to plaintiff in the sum of \$2,467.97 for goods sold and delivered, consisting of various chemicals and apparatus employed in manufacturing chemical products, the specific items of which it is unnecessary to summerate. Dubsequently, John H. Ledr and C. F. Wiehe were made defendants and an emended statement of claim was filed, which alleged that the two additional defendants attempted to organize the defendant corporation; that on November 5, 1918, a license was lessed by the secretary of State to certain persons as commissioners to open books for subscription to the capital stock of the France-American Chemical Corporation, and that the commissioners did not proceed further with the organization of the corporation; that the infendants Ledr and wiche were copartners in the mamuf cture and sale of chemicals, doing business under the name of the France-merican Chemical Corporation, which was merely a partnership; that the defendant Ledr represented himself to be a duly elected officer of said defendant corporation. and acting under that belief, plaintiff, at the request of Ledr. sold and delivered the goods and merchandise in question to the alleged Franco-American Chemical Corporation, when in fact Ledr purchased said goods for and on behalf of the partnership, doing business under that name; that on or about November 12, 1918,

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plaintiff and defendant Ledr, "co-partners as above alleged," entered into an agreement whereby Ledr, under the name of the Franco-merican Chemical Corpor tion, "in fact a partnership between C. F. tiebe and John . Ledr," agreed upon the purchase price of said articles, amounting in the aggregate to 32,487.97, approximately all of which had been used by the two defendants Ledr and Tiebe, and for which they are indebted to plaintiff to the amount above tated, and are jointly and severally liable.

A joint and several affidavit of merits was filed on behalf of the Franco-American Chamical Corporation and the defendants wiche and Ledr, which denied the corporate existence of the plaintiff and alleged that said plaintiff was incorporated under the laws of Illinois in 1917, and that its charter was concelled by the Secretary of State prior to the commencement of this action. thereby rendering it incompetent to maintain the suit. The defendants and each of them denied any dealings whatever with plaintiff and denied specifically the several allegations in the statement of claim to the effect that defendants were co-partmers doing business under the name of the Franco-Mariean Chemical Company. that the defendant ledr represented almost as an officeror manager of the France-merican Chemical Corporation, the alleged sale of the goods by plaintiff to defendants or either of them, and that the said merchandise was purchased by said ledr on behalf of the partnership for himself and the defendant wishe. The defendants further denied any agreement between plaintiff and the defendant Lear as to the prices of said articles, and that the said goods and merchandise were used by defendants or either of them, and denied any and all liability, joint or several, to plaintiff.

For further answer to the matters slieged in the amended statement of claim, defendants admitted that they had agreed to form a corporation known as the Franco-American Chemical Corporation:

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that sometime prior to Sovember 12, 1918, one Dr. Jay F. Fitts, who is said to be president of the plaintiff company, entered into an agreement with defendants viehe and Ledr to form such a corporation for the purpose of mamufacturing and selling chemicals under the name of Franco-American Chemical Corporation with a capital of 125,000, of which each was to contribute one-third; that defendants wiehe and Ladr fulfilles their agreement in that respect but that Pitts did not carry out his agreement, and for that reason the formation of the corporation was never completed: that when Pitts was called upon for his share of the capital he failed and refused to contribute the some, but stated that he would contribute some material; that sometime thereafter certain material arrived at the plant of the defendants on Altgeldt street in Chicago, some of which appears to be described in the amended statement of claim: that none of said material was delivered with the knowledge or upon the order of sither of the defendants, but came as a contribution to the enterprise from said Pitts; that defendants did not at any time know there was any such concern in existence as the plaintiff corporation, and charged that said A. B. C. Chemical Company was simply a name under which Dr. Jay F. Pitts did business: that the goods and merchandise described in the amended statement of claim were supposed to be the property of said Pitts and furnished by him as a part of his capital in said enterprise, and that if said Pitts purchased the same from any corporation he did so as his own act without any authority, knowledge or consent from the defendants or either of them. The efficavit of defense further stated that after defendants were informed that said property was at the plant they refused to accept the same and served a notice for its removal on seid Fitts on or about February 10, 1920, but that said Fitts and said plaintiff failed, neglected and refused to comply with said notice, but left the articles at the plant of these defendante; that if the goods and merchandise belonged to plaintiff, its right of

anist . . gal an alle the this tell, as lay ending became granuma "timitain and in Amedicard of the law of a die trat et et etti tir selvi, chan este dile dameraman pe the first few first manages of account of the light of the contract of the con A SELVE SELECTION DURING SERVICE SHEET TO THE PART OF PARTY the contents are the contract to the content of the refer of temporary wilds raiffilled about him and, weather gay by, preparties ablighed grow for bab esself thus for the remaining a seven the mail mail makes at the selfat topic as of the species and the same ballon some size. nime an surf intro for annually shrifters or boother fine in the Introduce other contracted to be the party claiming were expelled and and the colors of Jureau Tolores on adulation is all the desired of the colorest To garment is an exame all mi had should no of atmosps delin to on to broad will state born withit you fishe above 6200 to seem to was a consider and interest to be to delice the trians of the six discounts; and property reasons the six of the second statement of the enf) ล เอดเลกเลา กล์ กระบบกล เป็นการสม พอหายสมโด พอหมัด of a place of the part of the 1 W. granden of the side of the force of the contract of the miair to comminde it were not eat indicated to be decion a law ាស 1 mm ការណ៍ listair burn គេទំនាំស់។ ស្នំការ ដើម ស្ថិតសេសនេះ ស្រីស្ថិត នៅ គេទំនាំ turin vi v li i di uno "mingrefo» fina di isvince cia ko 🗆 👚 👚 I come ale en as all sel malresagras you mant were all and and antiorate, knows and recent to be the lift of and the this fact that the state of the m da spela un " " " a aformara bira Auda sugnalhi amar 10 និងមេសាកា - 23 កស់ ការនិកលា ៤ សិលមាកន ក្លាក សកម្ម ក្រៀបមក សាក the older when the year, and yet purpose their to me which have near their carrier or tearner has belonger and bell thirteen than ment of family and the published and first fast published In other one articular or regarded sections from these will be

action, if any, is against said Fitts and not against these defendants, and if there is any corporation entitled to maintain this
suit known as the A. B. C. Shemical Company, then said Fitts is the
owner and proprietor of the same and is simply using the name as
a means of suing these defendants, and finally, that if defendants
wiche and ledr are liable as partners for the merchandise in question,
then said Fitts is a partner also and incompetent to sue these
defendants. There was a jury trial which resulted in a vordict and
judgment in favor of plaintiff and against defendants ledr and siche
for \$2,487.97, from which this appeal has been presecuted.

We do not consider it necessary to review in detail the evidence, which in general musteins the allegations of the affidavit of merits filed by defendants. It does not disclose any agreement whatever on behalf of defendants "lehe and Ledr to purchese the merchandise described in the amended statement of claim. The only witness who testified on behalf of plaintiff was Br. Jay F. Fitts, who signed the affidavit attached to plaintiff's statement of claim. wherein he alleged that he is the president of the plaintiff corporation. His testimony as to the contractual relations between himself and defendants and the alleged sale of the goods and merchandise to defendants is not of a convincing character. A preponderance of the evidence shows that said Fitts, in company with defendants ledr and siehe, agreed to form a corporation, as alleged in the :fidevit of defence; that the two defendants performed their part of the agreement but that Pitts wholly failed to contribute his share of the agreed capital, except in so far as the goods and merchandise mentioned in the amended statement of claim may be regarded as a part payment on his account. The incorporation of the Franco-American Chemical Corporation was not completed, apparently on account of the failure of Fitts to contribute his share of the capital and the transaction seems to have been abandoned. The oral and documentary evidence seems to show that Fifts and the

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appellants have called our attention to numerous alleged errors on the part of the trial court in rulings upon evidence and in giving and refusing to give instructions. Heny of these contentions seems seritorious, but we do not deem it necessary to discuse them in detail, as we are of the opinion that plaintiff has shown no right of action at law against defendants.

The judgment of the Municipal Court is reversed with a finding of fact.

HEVERSED WITH FINDING OF PACT.

Cridley, P. J., and Bernes, J., concur.

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PIRDING OF FACT.

The court finds as an ultimate fact in the case that there was no agreement, express or implied, for the purchase by defendants or either of them from plaintiff of the goods and merchandise mentioned in plaintiff's statement of claim.

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MORRIS DRY and MEYER DHY, doing business as Dry and Company,

Appelleen.

VB.

APERAL FROM HUNICIPAL COURT OF CHICAGO.

FORD ROOFING PRODUCTS COMPANY, a corporation, also known as Ford Roofing Company,

appollant.

1034

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

to recover from appellant the purchase price of several carloads of rags. Defendant, who is appellant here, admitted the purchase of the rags and its obligation to pay the agreed price therefor, less certain deductions which were claimed and allowed. The correct amount of the purchase price was admitted upon the trial to be \$1.718.62. After refusing to receive certain evidence affered by defendant, the court directed the fury to find the issues for plaintiffs and assessed plaintiffs' demages at said sum and entered judgment upon the verdict. A reversal is sought upon the ground that the trial court creed in refusing to hear evidence as to matters set forth in defendant's affidavit of merits, which, if established by proper proof, would constitute payment by defendant of plaintiffs' claim.

The purchase of the rags took place in February, 1919, so shown by defendant's written order for the same. As there is no dispute about the value of the rags it will be unnecessary to review the pleadings upon that branch of the case. By its emended affidavit of merits, defendant alleged that in February, 1919, it sold and delivered to plaintiffs, who purchased and received the same from defendant, three carloads of mixed string at the price of \$350 per ton, defendant at that time being indebted to plaintiffs

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 for the rags purchased: that plaintiff directed defendant to charge plaintiffs' account with the price of the string, plus transportation charges thereon; that plaintiffs resugated defendant to ship said three cars of string to plaintiffs at Coicego as soon as pessible; that thereupon defendant charged plaintiffs' account with the purchase price of the three care of mixed string at the rate of \$30 per ton including transportation; that by so doing the entire amount due from defendant to plaintiffs for the rage was fully paid; that defendant shipped the three cars of string to plaintiffs at Chicago early in March, 1919, and upon their arrival plaintiffs advised defendant that they could not use the said cars of string and directed defendant to sell the same for and on behalf of plaintiffs for the highest price obtainable, and further directed defendant to credit the amount received for said three cars of string on the amount then due from plaintiffs to defendant. The affidavit further charged that defendant sold said string in conformity with these directions to the Central Trading Company for the highest price obtainable and realized therefrom #526.14, with which amount it credited plaintiffs' account, as directed by plaintiffs, and that defendant then remitted to plaintiffs the amount then remaining due from defendant to plaintiffs as shown by the account. The affidavit further alleged that a statement of this account, showing the transactions above set forth, was forwarded to plaintiffs, and defendant alleged that said account become stated between the parties.

Upon the trial of the case defendant offered to prove the fermioning matters alleged in its affidavit of defense, but the court declined to receive the proof upon the ground that the two transactions, one in rage and the other in string, did not arise from the same transaction; that each was complete in itself and that the claim of defendant based upon the sale of string

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was not liquidated.

The defence which was presented in this case was one of payment and not of set-off or recoupment. There was no claim of set-off filed. The distinction between payment and set-off is clearly set forth by the supreme Court in the once of Litch v. Clinch, 136 Ill. 410, and the difference between the two defenses lies in the fact "that it is optional with the defendant to plead his set-off as a defense or make it the subject of an independent suit, while ordinarily at least the defense of payment must be presented and litigated in the suit brought to recover the indebtedness alleged to have been paid or it will be barred and lost." Both of the parties to this suit have directed our attention to numerous authorities dealing with the subject of set-off, which we do not consider applicable to the present controversy. Fayment of a claim can be made by the delivery of goods or other specific articles if the contract so provides or the creditor consents thereto and acquiesces therein. 30 Cyc. 1187. The affidavit of merits clearly alleged that plaintiffs had consented to accept payment in whole or in part for / shipment of rags by the shipment of string made by defendant. The defense relied upon was valid if an tained by the proof.

It is urged by appelless that the alleged defense is invalid because the claim of defendant, based upon its shipments of string, was unliquidated. Unliquidated damages are those that rest in opinion only, and must be ascertained by a jury, whose verdict is regulated by the circumstances of each particular case. They cannot be ascertained by computation or calculation, and arise in cases where the amount thereof must be determined by the judgment or opinion of a jury. Ideal Coated Paper Co. v. Cupples anvelope Co., 169 Ill. App. 484. The items for which defendant claims credit were for goods sold and delivered at a specific price. It has been repeatedly held that a claim of this kind cannot

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on a second of the contract of the Models made in the conguige with the agree of the mediation of the same stage date. If you are not to the second of the party of the party of The second of the second secon and the state of the second of the second of the second and the se THE STREET STREET STREET STREET STREET STREET and figure agreement that the first and the affirmation of the second state of the second state of the second seco → dering high norm of the following should be in the part of the following for the following should be a finite or the finite or th the first state of the state of the first state of the st eg enjylaste en 1937 ejs egent pasen edda og egyfganieds to didn the to be to be to be the time of the best to be the best he house. It woney they believe but it will all the health and have you as of the second participant is not set to the set are not the set of to the same of the same of the control of the same of and the figure to each will, , aging a present consumps a firm a recept where experiences the affect of Kalegoria and emints to recomble and only see the J. Squarter X and Jole all the miles. regions 11 like a a more again tenting set grandmint and

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be regarded as unliquidated. Heat v. Crowe, 70 Ill. 91; Tartt v. Remey, 156 Ill. App. 468; Heanan Mercantile Co. v. Telter.
104 id. 279; Lather v. Mathis. 211 id. 566. The court should have allowed defendant to present its evidence effered in support of the defense alleged in its affidavit of merits. This defense involved questions of fact which it was proper to submit for the determination of the jury.

The judgment of the Municipal Court is reversed and the case remanded.

REVERSED AND REMANDED.

Gridley, F. J., and Barnes, J., concur.

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MILTON T. RIMBALL.

Appellee.

VB.

LOFTIS BRUS. & COMPARY, a corporation.

Appellant.

APPEAL PROM MUNICIPAL COURT OF CHICAGO.

225 TA 6803

MR. JUSTICE MORRILL DELIVERED THE OFINION OF THE COURT.

Plaintiff's statement of claim alleged that he was employed by defendant, whe is appellant here, about Gataber 2c, 1930, as a clark at a monthly salary of \$125; that the employment continued until Earch 21, 1921, when plaintiff was discharged without notice; and that he was entitled to thirty days' notice prior to his discharge, by reason whereof defendant become indebted to him for \$125. There was a finding and judgment in favor of plaintiff for \$127.79 and caste. No brief is filed on behalf of appellee.

The evidence shows that plaintiff was employed as above stated and was discharged March 20, 1931, on account of his refusal to work on the evening of that date. He had been paid previously for the amount due him up to March 15, 1931, at the agreed rate and was tendered payment up to the date of his discharge. The tender was refused but was again made in court appn the trial and again refused, plaintiff claiming that he was entitled to pay for a full month.

There is no evidence whatever showing or tending to show that the agreement under which plaintiff was employed by defendant contained any condition or provision which entitled him to demand thirty days notice of his discharge or to receive payment for any period after the date of his discharge.

The finding and judgment of the Municipal Court was

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contrary to the weight of the vidence, and for that reason must be reversed with a finding of fact.

REVERSED WITH PINDING OF PACT.

Gridley, P. J., and Barnes, J., concur.

AND THE RESIDENCE OF PERSONS ASSESSED.

attended and appropriate and an applicable

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FINDING OF FACT.

The court finds as an ultimate fact in this case that there was no agreement between the parties remaining the employer to give the employer thirty days notice of the discharge of the latter.

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EDWARD A. DALY.

Appellee

VS.

SDMAND A. WORRIS and JENEIE WOLF MORRIS. ARDELIA

Appellants.

APPEAL PHOM

MUNICIPAL COURT

OF CHICAGO.

235 I.A. 66.4

MR. JUSTICE MORRILL DELIVERED THE OFINION OF THE COURT.

This is an appeal from a judgment entered by the Municipal Court of Chicago in favor of plaintiff in an action of forcible istainer brought to recover possession of apartment "Number 3 on the third floor of the building known as number 5435 Michigan avenue." in Chicago.

Defendants were in possession of the premises under a lease from the owners, dated April 26, 1920, for a term commencing May 1, 1930, and ending April 30, 1931, and from year to year thereafter "unless and until this lesso shall be terminated at the date last above mentioned or a like date in any subsequent year thereafter by the giving by either party to the other not less than cirty days notice in writing of such termination, which said notice shall be delivered in person or be registered mail." The lessors gave such natice to the lesses, notifying them that the lesse would terminate April 30. 1921, and stating therein that the notice was given pursuant to the provision for a cixty day notice in said lease. This notice was dated Yebruary 14, 1931. It was sent by registered mail to the lessess and received by them February 15, 1921. . . cfondants remained in possession of the premises after April 30, 1921. The suit was brought May 3, 1921, by plaintiff, who is the lesses of the premises in question under a lease from the owners for a term commencing May 1, 1921.

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appellants contend that the natice was insufficient to terminate the lease by reason of a variance between the description of the premises set forth in the loses to defendants and that contained in the notice of February 14, 1981. In the lease the premises in question are described as "Apartment No. 2 on the third floor of number 5435 Michigan avenue." while in the notice the premises are described as "Third spartment, 54% Wichigen ovenue." It is undisputed that the notice was given by lessors and received by defendants more than sixty days prior to April 30, 1921, and that the notice was sufficient to advise defendants that it related to their lance of the premises in question. It was plainly intended to terminate the lease in accordance with its provisions. The notice described the premises with re-sonable certainty, and if construed according to the intention of the contract, as appellant contends must be done, shows a clear intention to terminate defendant's tenancy.

The judgment of the Municipal Court is affirmed.

Barnes, J., concurs:

Mr. Freelding Justice Gridlev took no part in the decision of this case.

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5, 1921. The case was assigned to a certain court room in the

Lity Hall and was reached for trial May 19, 1921. On the

preceding day the atterney for infendent having learned the

identity of the judge preciding in the room to said the case

had been assigned, metified his opposent that he would ask for

a change of vame. Then the case was called for trial defendent's

atterney requested a change of vame and precented infendent's

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was everywhed and the petition sended, solely becomes the defendant was not then precent in court and could bet be preduced for

exemination within fifteen minutes.

The petition for a change of reme was offered in evidence and refused. Commonl for defendant objected to the proceedings and declined to introduce any evidence. The trial judge them instructed the jury to find the issues for plaintiff and entered judgment for passession in favor of plaintiff.

The sole question involved in this appeal is the ther or not the trial judge erred in denying defendant's motion for a change of venue. It was urged by appelled that the position was defective and did not comply with the abstude. The alleged defects in the polition are not appearent. It was verified as

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246 - 27204

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FLORENCE G. COWLES.

Appellee,

VS.

BOWARD BROW.

Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

225 I.A. 6641

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

This is an action of forcible detainer brought in the Municipal Court of Chicago by appeller against appellant on May 3, 1921. The case was assigned to a certain court room in the City Mall and was reached for trial May 19, 1921. On the preceding day the attorney for defendant having learned the identity of the judge presiding in the room to which the case had been assigned, netified his appearant that he would ask for a change of verms. Then the case was called for trial defendant's attorney requested a change of verms and presented defendant's verified petition therefor. The record shows that the motion was overruled and the petition denied, solely because the defendant was not then present in court and could not be produced for examination within fifteen minutes.

The petition for a change of venue was effered in evidence and refused. Counsel for defendant objected to the proceedings and declined to introduce any evidence. The trial judge then instructed the jury to find the issues for plaintiff and entered judgment for passession in favor of plaintiff.

The sole question involved in this appeal is whether or not the trial judge erred in denying defendant's motion for a change of venue. It was urged by appelled that the petition was defective and did not comply with the statute. The alleged defects in the petition are not apparent. It was verified as

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There is no merit in appellee's argument based upon alleged defects in the petition. The petitioner had a right to a change of venue if he believed that the judge was prejudiced against him. Sec. 1. chap. 146 B. S. It has been held repeatedly that upon a proper application a change of venue must be granted. The statute is imperative upon the subject. Stauber v. Stauber.

200 Ill. app. 137; Enickerbocker Ins. Co. v. Tolman, SC Ill. 106; Glos v. Garrett, 219 id. 308. In Feigen v. Schaeffer, 256 Ill. 493, the judgment was reversed and the case remanded for failure of the trial court to grant a change of venue.

The judgment of the Eunicipal Court is reversed and the case remanded with directions to grant the application for a change of venue.

REVERSED AND REMANDED WITH DIRECTIONS.

Gridley, F. J., and Barnes, J., concur.

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HYMAN CHEETTOW.

Appellee.

VG.

RELIABLE STORK FIXTURE COMPANY. a corporation,

Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MA. JUSTICE MORALL ANLIVERED THE OPINION OF THE COURT.

This is an action brought to recover the purchase price of eight show cases ordered by appellant from appelles. The case was tried by the court without a jury and judgment entered in favor of plaintiff for 3789 and costs, from which this appeal has been taken.

Acting upon defendant's order, plaintiff mamufactured for defendant the eight show cases in question. The perties agreed upon the purchase price. Five of the cases were delivered to defendant and the remaining three were tendered to it March 1. 1931, but were refused by defendant. Defendant admits the giving of the order for the cases at the price stated, but alleges by way of defence that the material used and the workmanship employed in mamufacturing and finishing the cases were so faulty and defective as to render them useless to defendant and that they were not in accordance with the written order. A reversal is sought upon the grouns that the finding and judgment of the Municipal Court are contrary to the prependerance of the evidence.

The testimony of the various witnesses called by the respective parties was conflicting. The evidence on the part of plaintiff tends to prove that after the show cases had been manufectured they were examined by the president of the defendant

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corporation and pronounced satisfactory; that no objections to the articles were made by it and that defendant's only complaint related to the purchase price, which it was claimed was too high. This testimony was denied by the president of defendant corporation. He and several other witnesses testified that the show cases were not made of first plans material and were defective in worksamphip.

Under these circumstances it was clearly a guestion for the court to decide which witnesses were the more worthy of belief and to determine which side of the controversy was sustained by the greater weight of the evidence, as tested by well established rules. It is a familiar principle that the trial judge who sees the witnesses, hears their testimony and observes their demanor while testifying, is better qualified to pass upon their credibility than a reviewing court, whose conclucions must be based upon the printed record. For this reason the rule is firmly established that, where there is an irreconcilable conflict in the testimony, the judgment of the trial court will not be reversed if the evidence in favor of the successful party, by fair and reasonable intendment, will sustain the judgment. Culvert v. Carpenter. 96 Ill. 63; Lane v. Lesser, 138 id. 567; Carney v. Cheedy, 295 id. These and many other decisions to the same effect are controlling in the present case.

The judgment of the Municipal Court is affirmed.

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Gridley, P. J., and Barnes, J., concur.

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JAMUIL COLIMAN,

APPEAL PROM
EURERION COURT,
COUR COURTY.

225 I.A. 66

MR. JUSTICE MORRILL DELIVERED THE OPINIOR OF THE COURT.

Judgment was rendered in the Superior Court of Cook County in favor of plaintiff and against defendant for the sum of \$1500 as demages for slander. The jury rendered a verdict for \$3,000, but the trial court directed a remittitur of \$1500 and cotored judgment for the remaining sum. A reversal of this judgment is cought upon the ground that the verdict and judgment were contrary to the weight of the evidence and that the demages were excessive even after the allowance of the remittitur.

It is urged by appellant that when the verdict is clearly against the seight of the evidence, it is the duty of the trial court to grant a new trial. It will not be necessary for us to review the evidence in the case, for the reason that there was no motion on the part of defendant for a new trial. The rule is sell settled that where there is a trial by jury, a reviewing court cannot inquire into the sufficiency of the evidence to support a judgment unless there is a motion for a new trial and exception to the everruling of the same. I. Q. H. A. Co. v. O'Keefe, 154 Ill. 511; Firemen's Ins. Co. v. Pock, 126 id. 493.

Although we are not permitted under the foregoing rule to pass upon the question raised as to the preponderance of the evidence, we have examined the record with a view to determining whether or not the damages awarded are excessive.

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and are of the opinion that even if the slanderous words were spoken as claimed by plaintiff, her damages could not by any rule of computation be placed at so large a sum as \$1500. The amount of the verdict found by the jury can be explained only upon the theory that the jury misconceived the nature and extent of plaintiff's damages. To are of the opinion that the sum of 1750 will constitute a liberal compensation for any damages sustained by plaintiff.

The judgment of the Superior Court is affirmed, provided appelles files a remittitur of \$750 within ten days; otherwise the judgment will be reversed and the case remanded.

APPIRMED ON REMITTITUE.

Gridley, P. J., and Barnes, J., concur.

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MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

Suit was brought by plaintiff, who is appelled here, against Julius Losser, the defendant and appollant, in the Municipal court of Chicago to recover an amount alleged to be the for certain flasks and bottles wold by appelles to appellant for an agreed purchase erice of \$430.80. The affidavit of marita adultted the purchase of the servhandise, but denied that the bottles shipped were of the size, quality or kind ordered by him: alleged that there was a shortage in the chipment and that the bottles could not be used for the purposes intended and were therefore rejected by the purchaser. Defendant also filed a claim of set-off for the freight charges, decarrage and cartage upon the merchandine. The case came on for hearing before the Municipal court on April 13, 19 1, and after it had been purially heard there was a postponent to May 9, 1921, on which date the case was again reached for trial. The defendant was not then present in person or by attorney, and judgment was ortered in favor of plaintiff for the amount claimed.

A motion was made to vacate this judgment on June 8, 1021, supported by the affidavit of plaintiff's attorney. After consideration thereof and listening to arguments by saunsel, the court denied the motion. The present appeal is from the order of the Lunicipal court denying the motion to vacable the judgment of May 9, 1921.

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The affidavit filed in support of this motion states that the affiant believed and understood that the postponment of the trial on April 12, 1931, was to May 10, 1921, and that he recained under that impression until the afternoon of May 9.

1931, when he was informed by the attorney for plaintiff that the case had been heard on that lay and judgment entered against defendant for 1479.80; that he thereuper entered into regulations with plaintiff's attorney for the settlement of the judgment, so ich were unsuccessful, and that by reason of these regulations there was a delay in presenting the motion to vacate the judgment.

fendent had a meritorious defense to the action, and no reasonable excess to their action, and no reasonable excess to the action, and no reasonable excess to the description of the trial about in refusing to set acide the judgment will not be disturbed. The defeative party must show both dilinence and serit. Harrett . There was no abuse of discretion on the part of the trial court in refusing to recate the judgment.

The order of the Municipal court is affirmed.

AFFIHUED.

Gridley, P. J., and Barnes, J., concur.

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303 - 27261

HERBERT W. DUNCANSON et al.

VB.

of George Lill of al., On appeal of George Lill of al.,

VB.

PROPER OF THE STATE OF ILLINOIS

VALUE AMON

SUPERIOR COURT.

CCOK COUNTY.

225 IA 6845

MA. JUSTICE MORRILL DELIVED THE OFINION OF THE COURT.

Appellants seek the reversal of a decree of the Superior Court of Sook Sounty entered June 22, 1921, finding them muilty of contempt of court for their failure and refusal to answer certain interrogatories propounded and embodied in the smended bill of complaint herein and imposing a fine of 225 upon each of the respondents, and further directing, in the event of default in payment thereof, that the respondents be committed to the county jail for a period not exceeding ten days.

The amended bill of complaint, filed October 18, 1930, alleged that on March 29, 1918, complainants Merbert. Duncanson and Marriet B. Duncanson were the beneficial owners of the equity in certain real estate therein described, the fee simple title of which, subject to certain encumbrances, was vested in the Chicago Title and Trust Company as trustee under a certain trust agreement between that company and said complainants; that on said date defendants were engaged in the wholesale and retail coal business and were creditors of the complainant Merbert. Uncasson to a considerable amount for coal furnished to him, and that in order to occure the claim of said defendants and to obtain coal for the future operation and maintenance of his spartment buildings, said

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buncanoon entered into an agreement, partly written and partly oral, with defendants, whereby he and the said Harrist E. Duncanson, on March 20, 1918, agreed to convey to defendants their interest in the lands as accurity for said obligations, and with the further agreement that said complainants have the right to redeem said lands or repurchase them from defendants upon payment to them of a sum not exceeding 185,000 at any time within a period of two years from the date thereof and to redeem said lands upon certain agreed terms.

The bill further alleged that in accordance with said agreement, the real estate was conveyed to defendants and has been operated by them continuously since that time. The bill prays for an accounting and for a reconveyance of the lands in accordance with said agreement. Answers were filed by defendants denying the meterial allegations of the bill, to which complainants filed their exceptions. These exceptions were withdrawn by leave of court and on January 20, 1921, complainants filed a further amendment to their bill containing the interrogatories already mentioned. Certain pleas were thereupon filed by defendants, which were afterwards withdrawn pursuant to leave of court and a joint and several answer filed to the amended bill of complaint embodying practically the some allegations and denials as were contained in the original answer, but also averring that the discovery sought by the interregatories mentioned, in no manner tended to prove or disprese that complainants have any right, title or interest in and to said premises, and in an argumentative way alleging that to require defendants to answer said interrogatories and be to give complainants the relief sought by them before their right to such relief had been determined by the court and would be compelling defendants to make discovery of their private transactions, and proving that they be excused from enseering said interrogatories until complements had established their right to an accounting.

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The PARK Sheether all the tights and take off and him windrible of bright so and sinted from edit of sear Ille by the continuate since the bill read commissions at about and to asservances a set for golden see so an and the contract of the contra with a standard of the bill, to value oughts well facts and three to every in marketing were example of the analy and on Jonisty II, 18th, saughthings (11ct a fartner account to their EAST OF THE BOSTON OF THE STATE after serie there of the property of the Literature of the effect of the contract of the contr to see. Levere but the first the front to exact of the many, exited to est plicationes pelybedue des 10 mm de 1114 debuess est es 1117 Lenipino ed ni medate es cere se tialmat en anodagalla per all my three gravarith all radi passers entract and avery if an every of behase remand on all promisers animal mainten. hive or has al duringed to slidly thing you bred administrant that adiment to rest embodic out extractions as at rise, exists erfre es est billion en langue descente and billion encourses estendes fits down at reigh almir evelow would by dispute limited only also alligned artillages or bloom by Provi oil of Switzeship, and Jul 264246 has profit about eseving of oit to grandwill adem of arm health and relating arranged like a gains of the contract the co . The second of Exceptions were filed by defendants to this anseer, which were heard by the court April 30, 1931, and after orgament sustained, and an order entered directing defendants to file a complete and sufficient answer to the bill as amended, including a full and complete enswer to said interrogatories within five days from that date. "efcudants did not comply with this order. Thereafter complements moved for a rule on defendants to show cause why they should not be ettached for contempt of court for failure to comply with the order of April 30, 1921. The rule was granted and on May 27, 1921, defendents filed their answer, giving as a reasen for their failure to comply with the order, substantially the same argument that was set forth in the answer filed. The case was again heard by the court upon the rule to show couse and the mnewer of defendants thereto, and on Jone 29, 1921, the court entered its order finding that it had jurisdiction of the parties and the subject-matter, reciting the prior proceedings in the case, and finding defendants in contempt of court for their failure and refusal to comply with the order of April 30, 1921; and imposing the fine hereinbefore mentioned.

As grounds for a reversal of this order, defendants insist that the order requiring them to answer the interrogatories is in effect granting to complainants an accounting before the court has determined whether or not complainants are entitled to such an accounting and that no accounting should be required until complainants have first established their right to it, citing Ligare v. Pescock, 109 Ill. 94; Thodas v. Ashurat, 176 id. 351; and Barnes v. Barnes, 362 id. 393, and other authorities which support the general proposition that an accounting will not be ordered until the right to it has been established.

The interrogatories which appellants have refused to answer call for information which could be frunished only by defendants, as he the amount of income derived from the buildings,

when dealer when all he administed by builty yes confequent the state of the state of the fill of the state of the state Any resignor o cult of advaluation pouls refer a result of the with a policy and the party of a constant and the party of the party and next such cars and colors and compared that of terms of such BOW SAME STREET, THE STREET, THE STREET, STREET, STREET, magig maje do signitio in an tipo o rei or estado discolato manufacture the circulation of the character to the second to the contracter than the contracter to th A side was the second of the s a see they try it is the terms of the terms of the see that are the terms of the see that THE PART TAILED IT SHIPE OF THE COMP. CO-CONTRACT OF got! Lalil wearen wit at the fire to the learning as a conthe matter and of what and that follows being all though the to the common of the feet there ex, and in Incompany the common sealth of the and the and the twee that had grade to the art. and of agreement fairs of mariety are further life of him ក្នុងនៅថា កក្សាថ្នាល់ ២ ២ កក្ខាត់ក្រុង នៃខ្លែងប៉ាងស្រាក់ ត្រូវនេះ នៅថា និ in a line of the control of the cont placeling per chapped age and pullaged date

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operation, the amount due for coal from the complainent Norbert M.

Functions to those or the George Lill Tool Tompeny, all of which
were particulated to an accounting. An enswer to these interrogatories
cannot be regarded as an equivalent to granting to complainants
the accounting for which they prayed. The information sought was
in the nature of a discovery, and while it might or might not be a
basis for granting the relief sought, it was not the relief contemplated
by the proyed of the bill.

The procedure followed by the trial court seems to have been in etrict compliance with the requirements of the statute, which provides as follows:

"Then an answer shall be adjudged insufficient, the defendant shall file a further answer within such time as the court shall direct, and on failure thereof, the bill shall be taken as confessed; if such further answer shall be likewise adjudged insufficient, the defendant shall file a supplemental answer, and pay all costs attendant thereon; and if that shall be adjudged insufficient, the defendant may be proceeded against for a contempt, and the like proceedings be had thereen, to enforce the order of the court, as in other cases of contempt." Sec. 24, chap. 22, R. S.

The action taken by the court was authorized by the provision woted. Defendants had filed a second enswer, to which the court had austained exceptions, and an order had been entered requiring defendants to file a further and sufficient answer which also had been adjudged insufficient. The case could not be put at issue until a full and complete enswer had been filed. There is no serit in the contention of appellants that by answering the interrogatories complainants would be receiving the relief prayed by the bill. The order of the court for defendants to file a further answer is properly enforced by contempt proceedings.

Fasfield v. Boussan, 197 Ill. 347. It was encumbent upon defendants to file a full and complete enswer. Hopkins v. Eedley, 97 Ill. 402.

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The action wiles to tenter the court were entered by the factor factor which factor will be actions to the court for the court for actions and an order has been expended to the court for an action and an order has been expended to the court factor. The court is the court for action at the court factor will be an acquire a court for the court factor. The court factor action at the court of the court factor action and appellants. The court factor for the court factor factor for the court factor f

It is undisputed that the superior court had jurisdiction of the subject-matter of the case and the parties thereto. The order of april 30, 1921, directing the defendants to make a full and complete ensure to the bill one not void. Even if it sould be regarded as erroneous, it is not subject to collateral attack in a contempt proceeding arising from a refusal to obey it. Lyon a Marly v. Pieno Verkers' Union. 1889 Ill. 176. A defendant may refuse to obey an order share the court had no authority to make it and where it is absolutely void for want of power in the court, but he cannot rightfully refuse to obey it on the ground that it was improvidently or erroneously made. Christian Marpital v. The People. 223 Ill. 244. The judgment of the court is not subject to collaboral attack. Clark v. Jurke, 163 Ill. 334. This rule has been recognized by so many decisions of our Jupreme Court that it is no longer subject to debate.

The decree of the Japerior Court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

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HERMAN H. HETTLER LUMBER COMPANY, a corporation, HAMMY K. CHAPTS and HRL N C. JOH, sole heirs at law of CLAYTON . CHAPTS, deceased,

Appellees,

VB.

ARCHIBALD G. HODGE et al., ON APPEAL OF A. R. SUNDSTROM.

Appellant.

APPEAL FROM
SUPERIOR COURT.
COOK COUNTY.

225 J.A. 665

MR. JUSTICE WORKILL DELIVERED THE OPINION OF THE COURT.

The bill of complaint in this case was filed February

25, 1917, by Merman H. Hettler Lamber Company to enforce a

mechanic's lien upon sertain real estate. It is alleged that

complainant was a sub-contractor under the defendant A. E.

undstrom, the original contractor for the carpentry work.

We controversy is presented as to the rights of complainant.

The defendant Jundatrem filed his answer May 4, 1917, which was in the nature of an intervening petition, claiming a mechanic's lien upon the premises in question as the original contractor under a written contract with the owner for the carpentry work on a proposed apartment building. The agreed contract price was 120,500. The answer further elleged fulfilment of the contract by Jundatrom, and that there was due him, after the allowance of all just credits, the sum of \$5,619.30. For which amount he had filed his claim for a lien. The answer prayed that it be regarded as a cross bill and that Jundatrom be decreed to be entitled to a lien. The answer of the owner denied all material allegations and alleged, as a satter of defense, that Jundatrom as Jugust 32, 1816, for a valuable concideration, served to complete his contract for a further payment of 13,500, and upon receipt of such payment to release and

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Direct Appendix Printer Medicardis Printer Army

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waive any lies shich he might have against the premises, and that Sundstrom had received since said date an amount in excess of \$13,500 upon the contract. Other answers were filed, some of them in the nature of intervening petitions by lies claimants. The case was referred to a master in chancery, shows report found that undetrom had waived his right to a lies, and recommended that his intervening petition be dismissed. The report was approved by the court and a decree entered accordingly.

No question as to the sufficiency of the proceedings taken by undetrem to bring himself within the provisions of the Mechanic's Lien Act is raised. It fully appears that his statement of claim and pleadings were sufficient in law and filed in ample time. The only question presented for review, is whether under the circumstances shown, the instrument executed by undetrem on August 22, 1910, together with the payment therein mentioned, operated as a waiver of any right of lien which undetrem otherwise sould have had. If this issue is decided in the affirmative, it will be unnecessary to consider other questions raised as to the amount to which fundstrom is entitled.

The master's report, among other things, found that undstrom had received from the proceeds of the lean upon the building, the sum of \$15,520, in addition to other sayments amounting to \$3141.70; that an agest 10, 1916, aundstrom signed a receipt for \$7,000 without having ctually received any part of said sum as shown by memorandum in writing dated aptember 14, 1916, signed by the owner of the building, from which it appears that the receipt was a flotitious instrument, given solely for the purpose of anabling the owner to secure payments upon his building loan. The master's report further found that an ugust 22, 1916, aundstrom deliveres to the loan agent the following instrument, to-wit:

Enter the second of the second

"To whom it may concern:

For and in consideration of the sum of one Dollar and other good and valuable considerations in hand paid, the receipt whereof is hereby acknowledged. I, the contractor for the carpentry work on the building now in course of construction at 2. T. cor. Waller Ave. and Have St. hereby agree to camplete said contract on said building, according to the plans and specifications submitted to 2. S. Mitchell & Co., and further agree that as soon as the further sum of \$13,500.00 is paid or tendered to me to release and waive any lien which I may now or hereafter have against said building.

This writing was under seal and was executed by andstrom on the day it bears date. It is undisputed that it refers to the building upon which Jundstrom now claims a lien, and that he subsequently received on account of his contract the sum of \$13,500 therein mentioned.

It is contended by appellant that there was no waiver so the part of undetrom of his right to a lien; that such a waiver of a mechanic's lien is essentially a matter of intention, and that it was the intention of undetrom in executing this instrument and of the owner in procuring the same to effect an arrangement abereby the owner would be enabled to seeme disbursement of the building loan which he had negotiated upon the premises, and that the only effect of this agreement was by may of estoppel as to the lien of the loan obtained from Mitchell. In other words, this agreement of August 22, 1916, is to be regarded as to everyone except the mortgages, as a calarable transaction of the same character as the feccipt of August 10, 1914, whereby undetrom schooledged receipt of the sum of 37,000.

the instrument of august 22, 1916, to seem exactly what it says. There is no thing upon its face indicating that a waiver was contemplated as to the Mitchell loon only. While we are not called upon in this proceeding to pass upon the rights of the sortgages and the respective rights of the parties other than undertoo and the owner, we are not impressed with an argument based upon the

comment the \$1 and \$100.

ార్జులో ప్రాంత్ర ముంది. ప్రస్తుక్కు కార్డ్ కొండా కొండి ప్రాంతి ప్రాంతి ప్రాంతి ప్రాంతి ప్రాంతి ప్రాంతి ప్రాంతి ప్రాంత ప్రాంత ప్రాంతి ప ప్రాంతి ప్రాంతి

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august 10. 1916, or the limited meaning of the instrument of August 22, 1916. After the latter instrument had been executed and delivered and the payment of \$12,800 therein specified had been made, nothing further remained to be done by undetrem to carry his agreement into effect except the actual execution of a lien waiver. Appeller relies upon the see of Turner v. Franckle, 349 Ill. 394, which involved a contract for measury work payable as the work progressed. The contractor as ented and delivered to the mortgages a document which recited, in substance, that when the contractor received the sum of \$7800 without further not, the document should constitute a full and complete seiver and release of any and all lien or claim or right of lien. (p. 398)

The court found that the instrument was not ambiguous and its language clearly indicated an intention to maive the right to a lies upon payment of the sum mentioned. The contention was made that the release was for the purpose of establishing the priority of the mortgage over the lien claim, just as in the case at bor, and the court held that if such intention had been clearly expressed, the operation of the release would have been so limited, but that where a general walver wis executed and there was no thing in the context to show a contrary intention, the contract must be enforced as the parties made it. It is true that the phraseclogy of the instrument involved in the furner once differs slightly from that used in the accument of August 68, 1916, involved herein, end did not require the execution of any further instrument on the part of the lien claiment. We do not regard/as material, for the reason that equity regards that as done which ought to have been done. Hedalaki v. Hedalaki, 101 Ill. App. 158. This is a favorite mexim of equity and is said to be the foundation of all distinctively equitable property rights, sutates and interests. 21 0. J. 200. Upon the payment of \$13,500 to Sundstrom upon his contract, it

a streng with the committee of the strength of the committee of the strength of the committee of the strength toleta esta arrivat de la constructual de la compania de la constructua de la constructua de la constructua de the failt name property of the same conditions, the next of the same জানে , এই বিভিন্ন কৰা কৰা কৰা সংগ্ৰহণ কৰিছে আৰ্টি আৰু চিন্দু কৰা কৰিছে । আৰু চিন্দু কৰিছে কৰিছে কৰিছে কৰিছে ক and the self of a life quintle in the old serve energy, and self the artifle in gir: wit a set the mailler set alone to a set denot well have an od, to convert the valence coast to convert the parties on that he represent the rather house a state her that la est causil or most a castery introduct, de restrict con w · 我们是我这一点。" [1] "我们" "我说明" "我们" "我们" "我们" "我看了一点话的 化海绵管 化液 within a monthly and alternative of the level descent and the ably a maximus aritimal form to in where we are been restricted militar i servici menind nje a eli sedaki misera de lili ត្រៅតី សាក្តា _{ស្ត្រីពេធិ៍} កាត់កាត់ ការ ∑្រក់កាត់ កាត់កាត់ ការ រដ្ឋ ដែលគេក្តៅ ស្ត្រី ការ ដែល ប្រធិបតែការ at art as not a first transfer to the contract of the contract while of a resident and appropriate and an appropriate to the second placement of the termination of the March 18 can be selected to the selected to and so end to salve the last property of the special and នាស្នែក ខេត្ត មួយស្នើ អាចលោក និងស្រាយ ខាង ដែលនៃក្រុង និង became his duty to execute a suiver of his right to a lien, and he cannot be permitted to urge his failure to comply with the terms of his agreement as a reason for avoiding the agreement.

We are satisfied with the conclusion of the trial court upon this subject.

The decree of the Superior Court is affirmed.

AFFIRED.

Gridley, P. J., and Barnes, J., concur.

ACRESTANCE AND ADDRESS OF THE STREET OF

ATMANG AT LANGE POST OF A PARKETS

346 - 27304

JOSEPH PIECRA,

Appallas,

YB.

ROYAL MAYONEOUS OF AMERICA,

Appellant.

APPRIE THOM SEPARIOR COURT

225 I.A. 963

MR. JUSTICE WORTLD DELIVERED THE OFFICE OF THE COURT.

ficiary, upon a fraternal beneficiary certificate issued by appellent upon the life of Elizabeth Fikera, the vife of plaintlif. There have been two trials of the case in the Superior court of Cook County, in each of which there was a verdict and judgment in favor of plaintiff. There was an appeal to this court from the first judgment, which was reversed and the case remanded on account of errors of the trial court in ruling upon questions of evidence and in giving certain instructions. Fixers v. Heral Existence and in giving certain instructions. Fixers v. Heral Heighbers, 250 Ill. Asp. 680. The present assemble is from a judgment for al,000, the assemble of the certificate, resulting from the second trial.

Our former opinion, rendered December 31, 1920, contains a full statement of the pleadings, in which there has been no change since the first trial, and a complete cutline of the testimony, which is recviantially the same as upon the according, with the exception that certain features which was found objectionable upon the first trial are not contained in the properties of the pleadings and evidence, which would be only a repetition of what was stated fully in our former opinion, to which we refer.

The sole defense to the action is based upon a provision of the by-laws of defendant to the effect that the certificate shall

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be absolutely mult and void and all liability thereon entinguished if the death of the ember "results from original or self-inflicted abortion or alsoarriage or any attempt therest." The same condition is subschied in the certificate and the insured agreed to it in her written application for membership in the defendant sectety. The pleas over that the death of Elizabeth Pikora resulted from a criminal or self-inflicted abortion or miscarriage or an attend thereat.

On the part of the defendant it consists of the testimony of two attending physicians as to certain admissions made by decedent just prior to her death to the effect that she had consisted or attempted to commit an abortion by the use of a sharp stick. That the decedent made the statements attributed to her is decided by another equally credible witness, who was present and within hearing at the time. There was also associations as to a conversation between one of the physicians and plaintiff as to a certain stick found upon the premises, which was supposed to have been the instrument with which the criminal act was consisted. This testimony does not aid defendant's contention materially, so the stick is question was not identified sufficiently to permit its receipt in evidence, and for the further reason that there is a conflict of evidence as to wint the husband said at that time.

While the medical testimony fairly tends to prove that the cease of death was replicable from the free no abortion, there is no evidence, other than that above mentioned, tooding to prove that such abortion was celf-inflicted or criminal. It is undisputed that applicable might have been small by other coulibriums and that there may be an abortion which is not criminal or self-inflicted.

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Under these circumstances we are not justified in holding that the verdict and judgment were manifestly against the weight of the evidence to such an extent as to warrant a reversal of the judgment.

The judgment of the Superior court is affirmed.

Gridley, P. J., and Barnas, J., concur.

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387 - 27345

IN BE ESTATE OF JOHN W. WALKER,

WILLIAM L. BARTIN, individually and as administrator of said

Appollant,

AFFEAL FROM CIRCUIT COURT.

SHALL.

TR.

LOUIS C. COYNER, administrator de benis men of estate of JOHN W.

Appellee. 225 I.A. 665

MR. JUSTICE MONRILL DELIVERED THE OFINION OF THE COURT.

This is an appeal from an order of the Circuit Court of Cook County overruling the motion of appealant to vacate an order dismissing his appeal from an order of the Probate Court. The specal from the Probate Court was dismissed by the Circuit Court February 28, 1921. The metion to vacate said order was made within the term at which the order of dismissal was entered. The only question involved in this appeal is, whether or not there should be a trial in the Circuit Court to determine upon their merits, the questions involved in the settlement of this extate.

Ourt to the Circuit Court was from an order of the former court entered July 2, 1920, which recited that on or about April 14, 1916, the appellant was removed as administrator of said estate and Louis C. Coyner was appointed administrator de bonis nen and had qualified in that capacity; that by the same order appellant was directed to file a final account of his proceedings as administrator of said estate within ten days; that the said villiam L. Hartin, as administrator, appealed from said order of april 14, 1916, to the Circuit Court and to the appellate Court for the

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First District of Illinois, both of which courts offirmed the order of the Probate Sourt. The court further found in said order that appellant filed in the Probate Court an account current in July, 1916, showing that he had reserved as administrator personal property consisting of a stock of goods in a store located at No. 10 Cast Trenty-sixth street, Chicago, which said projerty had been appraised by appraisars appointed by the Frebate Court at 848.84; that he had collected oach amounting to 8449.79, making a total mount received of 11098.65; that he had paid to the widow of the decedent the sum of 110; that he had paid for a certified copy of letters of administration it, and that on July 19, 1919, he had deposited with the Clark of the Probate Court the mam of \$250, for which respective sums he was entitled to credit, and the court found that the not agruet of assets in the hands of the administrator was \$837.65, for which ap ellent was liable to his muccessor in office, and it was ordered that appellant turn over to the administrator de bonis non said sum of \$637.63, with interest at the rate of five per cent per anoun from February 8, 1916, within ten days from the date of the entry of the order. The syldence upon which the arder of July 3, 1020, was based is not shown in the record. In infer that it has not been preserved.

An affidavit in support of the motion to vacate the order of February 28, 1921, was made by appellant, allegias that he had filed his final account as administrator June 18, 1919. The affidavit does not allege that the account was approved by the court, but on the other hand, indicates that it had not and could not have been so approved. In his af idavit appellant set forth the account which he claimed to have filed June 18, 1919. This account, so far as the amounts involved therein are concerned, is identical with the statement of receipts and disbursements as found by the Probate Court in its order of July 2, 1920, with the single exception that appellant claims credit for the sum of \$197, claimed to have been

first Wistist of Chimins, Late of which or wirth a marke him at beat rearest come and affect absent our to beat Personal for Person wheelers will not really breaklying their waters apparation of the property and all rate and underly . The artists at bedanni mana a mi abang te doni a le pali fenna granjerg Witness has been been been about the course of the said to the appealand by approaches appeared by the realest to the a parties of the last of parties said meaning to last of the parties as which has at they had he shall give while he bestones become larger ways had tolvier a very like had not had just be may not declared not be to a set none seal to be a light out that the seal of the seal and a seal and the seal of wall, all to men out you I adequate wit to death out there is inger found wit han Athrea at bailing and was out again arthrogon age telegrications out to chief the of an a father to the soft in all remembers and likeling on the emparement in a like resprintation and ad two : mr ut I mailtong a built because a w ; I am eril to arm of the this inverse is the refer to the refer to - Der abbien fren februng fig 1951, mithia ten daye drom the tre, a mit anina mang mandita adi . rebro eti la geren eti l in a se sai as meads one at bease are . The . . The abeyyo and grand how and the term

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paid by him for the funeral expenses of the decedent. A large portion of appellant's afridavit is devoted to a nerration of his difficulties in finding this account in the files of the frebate Court, which seems to be immaterial, in view of the fact that with the single exception above noted, his statement of receipts and disbursements is the same as that embedded in the order of the Probate Court. Appellant also charges in his affidavit that he was compelled over his protest, by the Judge of the Probate Court, to inventory the goods and chattels in the store above mentioned, which he claims never same into his possession as administrator, and further, that he was ordered by the Frebate Court not to take charge of them.

Shile this affidavit is in some respects almost inoredible, and while we cannot say that either it or the affidavit of appellant's attorney in support of the motion to vacate the order of dismissal show either diligence or merit, yet the fact remains that so far as is shown by the record before us, there has never been any hearing upon the morits for the determination of the ewnership of the goods and chattels in the store. The evidence does not show whether they were properly charged to appellant or actually belonged to decedent's father, as he claims. The further question as to whether or not appellant is entitled to credit for the payment of the funeral expenses of decement does not appear to have been definitely determined, as admitted by counsel for appellee. The record does not show that appellent has converted these goods to his own use. It does not show the character of the goods, whether perishable or otherwise, or their present location. There is no evidence before us of any effort on the part of the administrator de bonis non to obtain passession of these goods since the disposition of the former anceal.

Appellant was entitled to have the order of July 2,

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1920, reviewed by the Circuit Court, and in view of the circumstances above mentioned, so do not think that the ends of justice were subserved by a dismissal of the appeal without a hearing and determination upon their merits of the questions above indicated, which must be wettled in order to ascertain the extent of appellant's liability, if any, for his acts or omissions as administrator of said estate.

The order of the Circuit Court is reversed and the case remended with directions to vacate the order dismissing the appeal from the Probate Court.

REVERSED AND REMARDED WITH DIRECTIONS.

Gridley. F. J., and Barnes, J., concur.

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387 - 27345

IN HE ESTATE OF JOHN W. WALKER,

WILLIAM L. MARTIN, individually and as administrator of said estate.

Appellent,

CIRCUIT COURT.

AFFEAL PROM

COUR COUNTY.

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LOUIS C. COYNER, administrator de bonis non of estate of JOHN W. WALKER, deceased.

Appallac.

MR. JUSTICE MORALL DELIVERED THE OFINIOR OF THE COURT.

This is an appeal from an order of the Circuit Court of Cook County overruling the motion of appealant to vacate an order discussing his appeal from an order of the Probate Court. The appeal from the Probate Court was dismissed by the Sircuit Court Pebruary 28, 1921. The motion to vacate said order was made within the term at which the order of dismissal was entered. The only question involved in this appeal is, whether or not there should be a trial in the Circuit Court to determine upon their merits, the questions involved in the settlement of this entate.

The record shows that the appeal from the Probate
Court to the Circuit Court was from an order of the former court
entered July 2, 1920, which recited that on or about April 14,
1916, the appellant was removed as administrator of said estate
and Louic C. Coyner was appointed administrator de bonis non and
had qualified in that capacity; that by the same order appellant
was directed to file a final account of his proceedings as administrator of said estate within ten days; that the said william L.
Burtin, as administrator, appealed from said order of april .4,
1916, to the Circuit Sourt and to the appellate Court for the

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397 - 27385

ARTHUR MEYER, a Winer, by R. J. NEYER, his Father and Next Friend, Appellace.

VB.

CITY OF CHICAGO, a Corporation, And SANITARY DISTRICT OF CHICAGO, a Corporation.

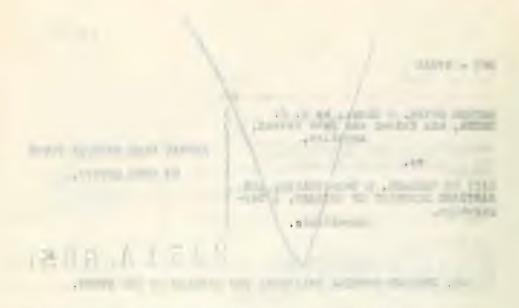
Appellants. APPRAL FROM CIRCUIT SOURT OF COOK COUNTY.

225 I.A. 6654

BR. JUSTICE SORRILL DELIVERED THE OPINIOR OF THE CHIEF.

This is an action to recover damages for personal injuries brought on behalf of a minor by his father and next friend
against the Cit, of Chicago and the Sanitary District of Chicago.
The injuries are alleged to have been caused by the minor coming in
contact with an electric light wire owned by the city and used for
the purpose of supplying current to the city's are lights. The case
was subsequently dismissed as to the Sanitary District. The verdict
and judgment were for \$10,000. The city offered no evidence in defense and moved for a directed verdict and later for a new trial,
both of which notions were devied. It is contended by the City of
Chicago that there is no evidence of its negligence in the maintenance and operation of its wire; that the wire did not constitute
an attractive missance and that the minor was guilty of contributory
negligence.

In the first count of the declaration it is alleged, in substance, that the city negligently permitted a certain electric wire, carrying a high voltage of electricity, to be suspended over and above the cast side of Albany avenue between Schubert and Logan boulevards in said city, the wire passing through or in close proximity to the branches of a tree in the street, and that the boy, in climbing the tree, case is sontact with the wire and received a charge of electricity which caused the injuries in question. The



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second count in substance charges defendant with negligence in failing to insulate and otherwise protect the said wire. The third count, with varying phraseology, alleged the facts and conditions under which the accident occurred substantially as above stated. The fourth count is based upon the theory that the wire was an attractive nuisance. A plea of the general issue was filed by the city.

The evidence shows that the City of Chicago maintained two electric are light wires stretched along the east side of Albany avenue supported upon wooden poles set in the parkway between the curbstone and widewalk; that in front of the presises at 2641 Albany avenue there was a large popular tree growing in the parkway, the foliage of which surrounded the wires; that the wires at the time of the accident carried approximately 4,000 volts of electricity; that on the evening of June 16, 1915, the minor, who was then ten years of age, climbed the tree and thereafter fell from his position, and that while so falling he grasped one of the electric wires, from which he received severe burns upon his left hand and foot, rendering it necessary to amputate three of the fingers and perform other curgical operations. The injuries were of a serious and permanent character. It is unnecessary to describe them more exclicitly, as me contention is made that the judgment was excessing in amount.

The facts and circumstances involved in this case are almost identical with those in the case of Budil v. City of Chicago, number 26055, decided by this court October 4, 1921, in which a petition for writ of certiorari has been denied. Our decision in that case must control the determination of the case at ear. The proof showed that the boy received the electric current by coming in contact with the wire while he was in the tree. The tree was on a public street between the sidewalk and the readway. The boy

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466. There is no evidence of contributory negligence on the part of the minor.

The judgment of the Circuit court is affirmed.

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Gridley, P. J., and Burnes, J., concur.

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FITTER M. CLAMBORN and DYLE RASEDSOM.

Appalleos.

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ASSA VARIER.

APPRAL FROM MUNICIPAL COURT OF CHICAGO.

225 I A. 666

MR. JUSTICE ECRETAL DELIVERED THE OPISION OF THE CONFIT.

This is an action of forcible detainer brought in the Municipal court of Chicago to recover possession of the pre-less located at numbers 3615-1675 Greenview ave we. Unleage, in which judgment was rendered in favor of plaintiffs April 26, 1921.

The evidence shows that the presises were devised by the owner, one Joseph Weissanreider, to one Helimeth A. Gross and one Frank ", Pamiler, who was the son of defendant, by a written lease dated october 34, 1919, for a term commencing November 1, 1919, and ending October 31, 1920, at a routal of \$40 per month. The lease also provided, in ambetance, that the lease chould have the option of extending the lease for a period of three years from November 1, 1930, at a monthly rental of \$80 for the first year, \$60 for the assend year and \$65 for the third year of the extended term. This option was exercised and the rental was paid by said Frank F. Pannier up to and including Pobruary. 1931. On Warch B. 1931, a five day notice and deann't for rent was served upon defendant, Anna Pannier, signed on behalf of plaintiffs by certain agents. Thereupon Frank V. Panuler, in company with one Veckelin, who was a vituess in the case and correborated Supplier's testimony upon the subject, tendered the root and demanded that he be given the usual receipt therefor, in his name, as had been done on many previous occasions. The agent refused to accept the rent except upon the condition that e

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by Attanto was realised by the last make sometime and the party of the second control of the second state of the second medition in the property like the new new new party of the party new party and the party new party and the party new party new party and the party new party new party and the party new p and the state of the latter of the state of server was the factors a security all process and not of the the local cold on the product of classical test took and plant in some a try where our princers of higher our court was not to the following for the company of the com WHEN PERSON AND ADDRESS OF THE PERSON NAMED IN COLUMN 2 ADDRESS OF THE PERSON NAMED AND PARTY. and the second of the second o a transfer, attace of the second section is the second second second second second second second second second to blace or hearty products over plantages to be blesse and the first property of the second seco AND DESCRIPTION OF PERSONS ASSESSED ASSESSED. , the company of the property of the first of the property of the second and the second of the second o

receipt be given, made out to his mother, Anna Pannier, the defendant. The tender was kept good in court. These facts are undisputed.

the lessor of the presides, Joseph Veissenreider, lestified uses the trial that his grandson, one Fieck, had owned the property cince June, 1980, and held the legal title thereof, although rent had been paid to the citness buring the whole period. To concetent evidence of this transfer one furnished and none a owing that the temant was ever saviged of the transfer or that the lessor's interest is the lease was ever a signed to fieck. The only interest which plaintiffs have is incomparing to under a certain a respect which plaintiffs have is incomparing to under a certain a respect dated worsh b, 1981, whereby disak and his wife agreed to sell the presides to question to plaintiffs upon certain terms therein set forth. There is no evidence that this outrast was ever consummated or that plaintiffs have any title to the real estate in question.

right to the possession of the precises or that defendant Anna familier ever was in possession thereof, except as an agent of her sen in conducting the early and soft drink business which the latter operated upon the dealess precises. It is contended on behalf of supelless that feitsenreider was analyse to read, write or understand English, and that he did not know the contents of the lease which he had executed and delivered to Frank J. Funniar, but there was suple testiment to the effect that at the time of the execution of the lease that lease the document was read to him in the German language and that he thoroughly understand the transaction.

The judgment of the Bunicipal court is reversed with a finding of facts.

REVERSED WITH FISHING OF FACTS.

Gridley, P. J., and Barnes, J., concur.

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459 - 27567

FINDING OF PACES.

The court finds as ultimate facts in this quee that there are no contractual relations between plaintiffs and defendant hovein, and that defendant did not unlewfully vitically possession of the precises in queetion.

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PACIFIC LUMBER CO. Commercion.

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VII.

GUIDAGO TOY FORKS, a Corporation,

Annetlant.

APPRAIL FROM MUSICIPAL COURT OF CHICAGO.

461.

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THE STATES SHALL COMMENTED THE CHIEF OF THE SCHOOL

This is an appeal from a judgment for \$1515.63 entered by the funisipal wourt of Chicago upon a directed verdict. The suit was brought upon an account stated for lusher sold and delivered by plaintiff to defendant. Defendant contended that the lumber was sold for the purpose of being used in the manufacture of toys and that plaintiff knew of the intended use to be unde of it; that the lumber was not fit for such use and that therefore plaintiff is precluded from a resovery upon the ground of the bread of an implied warracty that the goods should be reasonably fit for the purpose intended. A reversal is sought upon this ground.

We find me evidence in the record tending to matein defendant's contention. The evidence shows that the transaction originated with existen orders from defendant to plaintiff for the shipment of the lumber in question; that the lumber was delivered as ordered and no objection was made to the same except that on the occasion of one interview remarding the author, defendant requested plaintif to take back certain inch and a half lumber included in the order. Plaintiff complied with this request and gave to defendant a credit of 3498.05 upon the account.

There was no testimony that the Lumber was not as ordered or that it had not been used or that it had ever been tendered



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back to plaintiff, with the asception of the alsos above mentioned.

Repeated statements of the account were sent by plaintiff to de
iendent and no evidence was differed as received that my objection
had over been mad e to the account, as stated.

Under these circumstances the court was justified in directing a verdict for plaintiff for the amount of the balance due on the account. Numerous renormants of the account having been received and retained by defendant without objection to any of the items, the defendant must be regarded as having valved all objections, if it ever had any. Furitied v. Dickinson, 153 III. App. 36. There was as implied premise on the part of defendant to pay the balance. Bick v. Ziemernan, 207 III. 636.

The judgment of the Sunicipal court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

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BUMA ANDERSON.

Appellee.

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Abpeliant.

APPEAL PROM MONICIPAL COUNT OF CHICAGO.

225 TA 6563

MR. JUSTICE MORRILL DELIVERED THE OFINION OF THE COURT.

This is an appeal from a judgment of the Municipal court of Chicago in favor of plaintiff in an action of foreible detainer brought on May 13, 1931, to recever possession of the presides described in the complaint, hown as flat No. 3 on the third floor of the building at 1420 Thome avenue, Chicago. Defendant was in possession under a lease from the former owner to her for a term commencing May 1, 1919, and ending April 36, 1930, subject to the following stimulation, to-wit:

"Provided sixty days written notice is given lessor by lesses of lesses's intention to terminate this lesse on said last centioned date, otherwise this lesse, including all covements and conditions therein, shall continue from year to year until terminated by like notice in some answing year. Lesser is entitled to terminate this lesse upon like notice to icasee at like dates by malling said notice to the within mentioned premises addressed to said losses."

The lesson's interest had been assigned to plaintiff, as shown by the endersements upon the lease. The lessee held possession after May 1, 1021. A sixty day notice of termination dated January 18, 1921, was served upon appellant by leaving a copy with appellant's daughter. The receipt of this notice is admitted. The motice informed defeniant that the lease in question would be terminated on april 30, 1921, and that it was given pursuant to the growision for a sixty day notice contained in the lease.

It is contended on behalf of appellant that the finding of the trial court ices not accurately describe the premises. The

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described in the complaint, which was a sufficient identification of the presises. It is also centended by appellent that the sixty days notice was included because served on the daughter of defendant instead of having been mailed to the losses. To objection was sade by appellant upon the trial to the introduction of the motice on account of the manner in which it was served. Defendant admitted receiving the notice more than sixty days prior to the termination of the lease. We do not regard it as material that the notice was served by delivery upon the premises instead of by unit. The notice was not misleading and gave the necessary information to the proper parties. Its receipt was admitted and an objection as to the manner of service cannot now be considered. Thomason v. Vilson, 146 Ill., 384.

It is also urged by appellant that there was no evidence offered of the assignment of the original lessor's interest in the lease. It is a sufficient answer to say that the lease with the assignments undersed thereon was received in evidence.

It is also asserted by appellant that the action should have been brought by plaintiff as assigned. There is no serit in this contention. An application for a stay of execution under the so-called Esseinger Act was granted by the court and the writ was stayed until August 1, 1931.

The judgment of the Municipal court is fully suctained by the evidence and is therefore affirmed.

AFFIRED.

Gridley, P. J., and Barnes, J., cencur.

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LOUIS J. STOLLOF,

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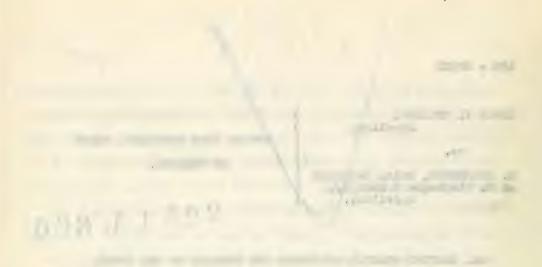
H. HLIBOGH, Doing Business as H. Elenbogen & Company, Appellant. OF GUICAGO.

225 LA. 6681

IN. JUSTICE MORRILL MELIVISMO THE CRIMICAL OF THE COURT.

Judgment was rendered by the Municipal court of Chicago in favor of plaintiff for \$67 and sests after a trial before the court without a jury. The motion was brought for the recovery of \$188, paid by plaintiff on March 16, 1014, for the transportation of two persons from Lithuania to Chicago via the Thite Star Dominion Line, of which defendant was agent for the sale of tickets. Ho brief is filed on behalf of appelles.

Thereafter plaintiff notified defendant that on account of war coeditions then existing, the versus for when the transports. tion had been purchased were unable to travel and asked for the casecellation of the :1 :kets. Defendant agreed that he would cancel the tighets and return to plaintiff whatever amount he received from the steamphip company as a refund. The sum of \$67.10 was ressived by asfendant from the stummehly company and he delivered this mount to plaintiff May 15, 1917. Plaintiff never made my darund for any money since the receipt of the 557.10 until the trial of the case. The balance of the money paid for the ticket was \$57.90. explanation is given of the theory upon which the court remiered judgment for 567. It is apparent that defendant was acting as an agent for the steamahip company and did not personally relain any part of the funds which he received in payment for the tickets. It was well known to plaintiff that defendant was noting as such agent. Plaintiff had no right of action against defendant.



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The judgment of the Municipal court is reversed with a finding of facts.

REVERSED FITH FINDING OF FACTS.

Gridley, F. J., and Barnes, J., concur.

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AND RESIDENCE OF STREET

CONTRACTOR OF A CHARGE

475 - 27433

PINDING OF SACTS.

The court finds as ultimate facts that defendant was acting solely as an agent of the eteamship company in salling the tickets in question to plaintiff and that plaintiff know at the time of the sale that defendant was acting as such agent.

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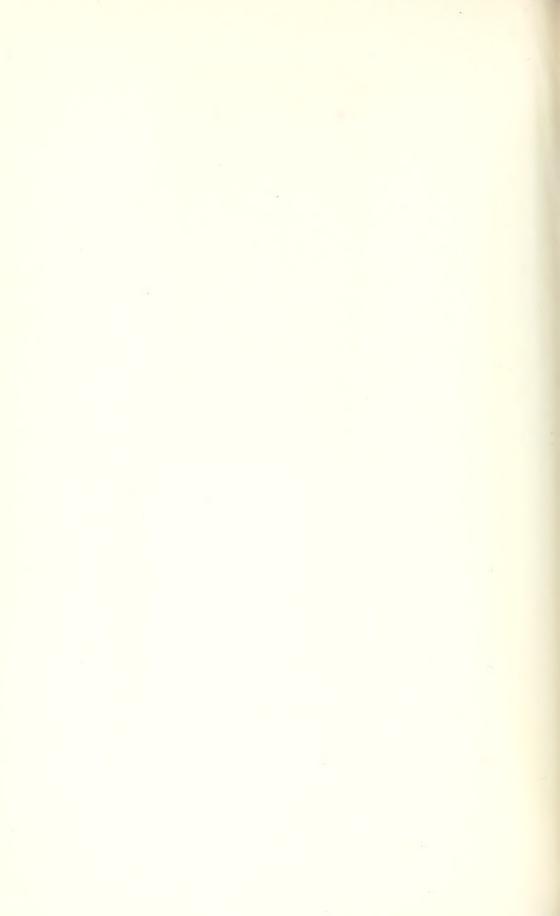
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